(4)

No. 89-1149

In The

Supreme Court of the United States

October Term, 1989

COY R. GROGAN AND JOHN H. HENSON,

Petitioners.

v.

FRANK J. GARNER, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed
December 11, 1989
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January 6, 1987 –	Adversary Hearing before the Honorable Frank Koger United States Bankruptcy Judge.
February 24, 1987 –	Memorandum Opinion and Order entered by Bankruptcy Judge Koger holding Garner's debt to Grogan and Henson is non-dischargeable under § 523(a).
March 20, 1987 –	Order Denying Motion To Alter Or Amend Judgment entered.
April 9, 1987 –	Designation of Issue on Appeal by Debtor Garner for U.S. District Court.
May 11, 1987 –	Notice of designation of record on appeal entered by U.S. District Court.
June 17, 1987 –	Amended Memorandum Opinion and Order entered by Bankruptcy Judge Koger.
February 29, 1988 –	Order and Judgment entered by U.S. District Judge Whipple affirming Bankruptcy Court decision.
May 19, 1988 –	Order entered by Judge Whipple denying appellant's motion to alter or amend judgment.
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July 7, 1988 – Appeal Briefing Schedule Order issued by Eighth Circuit Court of Appeals.

August 9, 1989 – Judgment entered by the Eighth Circuit Court of Appeals reversing the decision of the U.S. District Court.

September 12, 1989 – Motion for rehearing denied by the Eighth Circuit Court of Appeals.

December 11, 1989 – The Petition for a Writ of Certiorari filed.

April 30, 1990 – The Petition for a Writ of Certiorari granted.

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI

In Re: Frank J. Garner, Jr., Debtor,	)	No. 85-03755-2-11
John H. Henson and Coy R. Grogan, Plaintiffs,	)	Adversary No. 86-0183-2-11
v. Franklin J. Garner, Jr., Defendant.	)	

COMPLAINT UNDER SECTION 523(a)

(Filed May 7, 1986)

For their complaint against the defendant, Franklin J. Garner, Jr. ("Garner"), John H. Henson ("Henson") and Coy R. Grogan ("Grogan"), the plaintiffs, state the following:

1. This Court has jurisdiction over this proceeding under 28 U.S.C. § 157(b)(2)(I).

2. Garner is the debtor in *In re Garner,* No. 85-03755-2-11, a case filed under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri.

3. Henson and Grogan are creditors of Garner.

4. This is an adversary proceeding to determine the dischargeability of debts owed by Garner to Henson and Grogan.

5. Prior to 21 October 1985, the date Garner filed his bankruptcy petition, Garner owed Henson for $409,158.00, plus interest from 8 May 1985 at the rate set by 28 U.S.C. § 1961. That debt was based on a judgment in favor of Henson and against Garner entered in a civil action in the United States District Court for the Western District of Missouri in a matter styled *Grogan and Henson v. Garner*, No. 84-0516-CV-W-5. The basis for the judgment was that Garner obtained for his own use, and through a willful and malicious act of fraud and conversion, the proceeds from the sale of stock in a corporation in which Henson was a shareholder.

6. Garner's debt to Henson is nondischargeable under § 523(a)(2) and § 523(a)(6) of the Bankruptcy Code.

7. Garner's debt to Grogan is nondischargeable under § 523(a)(2) and § 523(a)(6) of the Bankruptcy Code.

WHEREFORE, John H. Henson and Coy R. Grogan each request that this Court determine the debts of Franklin J. Garner, Jr. to them are nondischargeable, and that the plaintiffs have such other and further relief as is just.

(Signatures And Certificate Of Service
Omitted In Printing)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ADVERSARY NO. 86-0183-2-11

(Caption Omitted In Printing)

ANSWER

(Filed May 15, 1986)

COMES NOW Defendant, Franklin J. Garner, Jr., and for his Answer to Plaintiffs' Complaint herein, admits, denies and states as follows:

1. Defendant admits the allegations set forth in paragraph 1 of Plaintiffs' Complaint.

2. Defendant admits the allegations set forth in paragraph 2 of Plaintiffs' Complaint.

3. Defendant admits that Plaintiffs are currently creditors pursuant to a judgment entered by the United States District Court for the Western District of Missouri, and further states that said judgment is now on appeal in the United States Court of Appeals for the Eighth Circuit in response to paragraph 3 of Plaintiffs' Complaint.

4. Defendant admits the allegations set forth in paragraph 4 of Plaintiffs' Complaint.

5. In response to paragraph 5 of Plaintiffs' Complaint, Defendant admits the judgment of the United States District Court for the Western District of Missouri, denies all other allegations set forth in paragraph 5 of Plaintiffs' Complaint and further states to the Court that the judgment entry of the United States District Court for the Western District of Missouri speaks for itself.

6. Defendant denies the allegations set forth in paragraph 6 of Plaintiffs' Complaint.

7. Defendant denies the allegations set forth in paragraph 7 of Plaintiffs' Complaint.

8. That as previously stated, the judgment entered in favor of Plaintiffs against Defendant in the United States District Court for the Western District of Missouri is now pending on appeal in the United States Court of Appeals for the Eighth Circuit. That the oral argument on said appeal is scheduled in the very near future with a subsequent ruling on the appeal anticipated thereafter. Defendant respectfully requests that this Court take no action on Plaintiffs' Complaint herein until the decision of the United States Court of Appeals for the Eighth Circuit is rendered. In the event that Defendant is successful in his appeal to the Eighth Circuit, Plaintiffs' Complaint herein would be rendered moot and that any action by this Court on Plaintiffs' Complaint herein would be subject to the decision of the appeal pending before the Eighth Circuit.

9. Defendant affirmatively states that Plaintiffs' Complaint herein fails to state a cause of action upon which relief may be granted.

WHEREFORE, having fully answered Plaintiffs' Complaint herein, Defendant Franklin J. Garner, Jr. requests that Plaintiffs take naught by their Complaint, that any indebtedness that may be due and owing from Defendant to Plaintiffs be deemed dischargeable, and that Defendant have such other and further relief as the Court deems just and proper in the premises.

(Signatures And Certificate Of Service
Omitted In Printing)

No. 86-0183-2-11

(Caption Omitted in Printing)

TRANSCRIPT OF ADVERSARY HEARING
BEFORE THE HONORABLE FRANK KOGER
UNITED STATES BANKRUPTCY JUDGE

(Filed May 5, 1987)

(p. 2) COURT IN SESSION AT 2:10 P.M.

THE COURT: John R. Henson, Coy R. Grogan, plaintiffs, versus Frank J. Garner, Jr., adversary on dischargability.

Attorney for the plaintiff is –

MR. FRANKLIN: Thomas M. Franklin.

THE COURT: Okay. You may proceed, Mr. Franklin.

MR. FRANKLIN: We have not discussed the foundation law aspects of this, do you have any objections to identification or to the genuineness of this document?

MR. BARKER: I've got no foundation objections to it, no.

MR. FRANKLIN: Your Honor, at this time we offer Exhibit #1 for the plaintiffs, which is the First Amended Complaint in a civil action in the United States District Court for the Western District of Missouri, styled Coy R. Grogan and John H. Henson versus Frank J. Garner, Jr. And Exhibit #1 consists of the First Amended Complaint in that civil action.

MR. BARKER: Your Honor, defendant would object to it on the grounds of relevancy. The plaintiff has

plead a judgement in his pleading. We have admitted to that in our responsive pleading and I don't believe that the complaint in the underlying transaction has any relation to the claim of dischargability here. We would object to it on that basis.

THE COURT: Well, I think it forms part of the Court file and the Bankruptcy Court is an adjunct or branch of the (p. 3) District Court and therefore I suspect that I can take judicial notice and I am going to admit it.

MR. FRANKLIN: Your Honor, at this time, plaintiffs offer Plaintiff's Exhibit #2, which consists of an Addendum to the Brief of the Appellant filed by Frank J. Garner, Jr. in the United States Court of Appeals for the 8th Circuit, case number 85-2098-WM, styled Coy R. Grogan and John H. Henson, appellees, versus Frank J. Garner, Jr., appellant. This document, which I understand Mr. Barker is also waiving identification and genuineness objections, consists of the jury instructions given in the matter that was heard in civil action, consists also of the verdict directive forms and also the judgement entered by the District Court in the civil action filed in the United States District Court for the Western District of Missouri. Plaintiff is offering Defendant's [sic] Exhibit #2 at this time.

MR. BARKER: Your Honor, we would again object to everything except the judgement that's contained in Plaintiff's #2 on this same basis and maybe to shorten this up, Mr. Franklin and I agreed to certain documents arising out of the underlying trial, as far as foundation and those type of objections – we will waive those. I will simply have a standing relevancy objection

to all of those documents and it would be my understanding that the Court would overrule that objection.

(p. 4) THE COURT: Well, the brief, I'm not so sure – that's in the Court of Appeals?

MR. BARKER: Yes.

MR. FRANKLIN: It is an addendum, Your Honor –

THE COURT: Oh, it's an addendum.

MR. FRANKLIN: – that was submitted –

THE COURT: It's not the brief.

MR. FRANKLIN: It contains copies of the jury instructions used in the District Court, a copy of the District Court's judgement and a copy of the verdict directing forms. We're offering that as relevant because, although as Mr. Barker indicates, the debtor has admitted the judgment in the District Court, they are denying certain features of the complaint of non-dischargability here at issue. We're alleging that the debtor is barred by the doctrine of collateral estoppel from relitigating all of the fact issues that were decided in the District Court. The instructions clearly specify all of the fact issues that were decided in the District Court.

THE COURT: All right. I'm going to admit that document.

MR. FRANKLIN: Your Honor, at this time the plaintiffs offer Plaintiff's Exhibit #3, which is an opinion of the United States Court of Appeals for the 8th Circuit in case number 85-2098, Coy R. Grogan and John H. Henson versus Frank J. Garner, Jr.

(p. 5) MR. BARKER: Your Honor, we'd made the same objection to that document.

THE COURT: It will be admitted.

MR. FRANKLIN: And finally, Your Honor, plaintiffs offer Plaintiff's Exhibit #4, a letter from the clerk to the United States Court of Appeals dated December the 8th, 1986.

MR. BARKER: Same objection.

THE COURT: Who's the letter from?

MR. FRANKLIN: The letter is from a deputy clerk, Your Honor, and the letter is offered to indicate that a judgement was entered by the 8th Circuit.

THE COURT: It will be admitted.

MR. FRANKLIN: Your Honor, the plaintiffs rest.

THE COURT: All right. Mr. Barker?

MR. BARKER: Your Honor, the defendant would move for a directed verdict at this time on the basis that there has been no showing that the – according to Section 523A2A that the underlying debt is based on the false pretense, false representation or actual fraud. I think the other ground that has been pled is under Section 6 for wilful and malicious injury by the debtor to another entity or the property of another entity. I don't think there has been any showing of that. I'm not aware of any case – any bankruptcy case in this country that has held that simply a showing of a judgement in an underlying case is sufficient to authorize the Court to (p. 6) exempt a debt from discharge. The debt that is reflected in the

judgement of the District Court – it is simply not sufficient to do tht [sic]. I think that the Court is not required to wade through a bunch of documents to determine whether or not this debt is discharable [sic] or not. I think the burden's on the plaintiff to produce affirmative evidence that either a false statement or a false misrepresentation was made, the extent of the injury that was done thereby and that simply hasn't been done. All they've done is say, "Hey, we've got a judgement that is based on fraud and so therefore it ought not to be dischargable." The position that this puts us in is to either A, attempt to impeach the judgement, which I'm not sure that we can do or that anyone can do and it gives us nothing to fight with. There are a lot of errors that were claimed in that trial. The case has gone to the 8th Circuit. The 8th Circuit ruled about a month ago and there are still other remedies that the debtor has in the appellate system with respect to that case. It's by no means over and for the plaintiffs to rely on this collateral estoppel theory without producing any – either one of them, either Mr. Grogan or Mr. Henson, to get up here and say, "Well, Frank Garner did this to me and it cost me this much money." I don't believe that it is sufficient to get up here and do this. I would ask the Court to direct a verdict in favor of the debtor and against the plaintiffs.

THE COURT: I'm going to have look [sic] at the exhibits at (p. 7) this point. Mr. Barker, I think you have an excellent point. I don't think frankly that I have enough here to make any ruling because the normal rule is that it is the Bankruptcy Court that must make the determination of non-dischargability or dischargability. However, there are certainly allegations of fraud in here

and there are jury findings, etc. Although, as I say, I think you have an excellent point, for the moment I am going to overrule your motion and you may present any evidence you wish or not and I will go on from there.

MR. BARKER: Your Honor, may we have about five minutes?

THE COURT: Sure.

MR. BARKER: I had anticipated live witnesses from the plaintiff's side and I really hadn't prepared – and I would like to discuss just for a few moments with my client.

THE COURT: Certainly. The Court will recess for 10 minutes.

COURT IN RECESS FROM 2:22 P.M. TO 2:35 P.M.

THE COURT: All right, Mr. Barker.

MR. BARKER: At this time we would call Frank Garner.

FRANK J. GARNER, JR., DEFENDANT, SWORN

DIRECT EXAMINATION

BY MR. BARKER:

Q. Would you state your name for His Honor, please?

A. Frank J. Garner, Jr.

(p. 8) Q. You are the debtor in this Chapter 11 filing?

A. Yes, sir.

Q. And the defendant in this adversary action?

A. Yes.

Q. Mr. Garner, did you at any time during 1978 make any false statements of existing fact to Mr. Coy Grogan?

MR. FRANKLIN: I'm sorry. Are you done?

MR. BARKER: That's my question.

MR. FRANKLIN: I'd like to make an objection on the grounds of relevancy because this fact issue has been fully litigated previously. A judgement has been entered against the debtor on this issue and I believe that he is precluded and estopped from again raising this matter in this Court.

THE COURT: Overruled.

BY THE WITNESS:

A. No, sir.

Q. Mr. Garner, at any time during 1978 did you make any false statements of existing fact to Mr. John Henson?

A. No, sir.

MR. FRANKLIN: Same objection.

THE COURT: Same ruling.

BY MR. BARKER:

Q. Mr. Garner, during 1978 did you obtain any money from either Mr. Grogan or Mr. Henson on the basis of a misrepresentation?

MR. FRANKLIN: Your Honor, if I might have a continuing (p. 9) objection.

THE COURT: Certainly. You may.

MR. FRANKLIN: Thank you.

BY THE WITNESS:

A. No, sir.

Q. One other question, Mr. Garner. Did you injure either Mr. Grogan or Mr. Henson during 1978?

A. No, sir.

MR. BARKER: That's all.

THE COURT: You may inquire.

MR. FRANKLIN: No questions, Your Honor.

THE COURT: You may be excused.

MR. BARKER: Your Honor, defendant rests.

THE COURT: Very well. Anything further?

MR. FRANKLIN: Nothing, Your Honor.

THE COURT: You all have posed me a very pretty problem. Mr. Franklin, I don't know whether you have made a case or not. To some extent the Bankruptcy Court is the sole determiner of dischargability or not. A ruling of another tribunal, whether it be State or Federal, in some instances is not binding on the Bankruptcy Court. I'm going to have to, very frankly, gentlemen, do a little research because this is a problem I have not yet faced. I don't know how far I can go into the District Court file as it presently stands or what I can do. I will

take it under advisement. I will give you a (p. 10) written opinion, hopefully within a reasonable period of time. But I have to tell you in all honesty, I don't know the answer today. Thank you, gentlemen.

MR. BARKER: Your Honor, before we would conclude, I would like to point out one other thing.

THE COURT: Oh, yeah. Go ahead and then let me say another thing.

MR. BARKER: And that is simply that the civil judgement underlying is in three different counts and there has been, as far as I understand anyway, that civil judgment – the plaintiffs have some right of election on collection of that judgement and there has been no such election that I am aware of to date. I think that also affects the nature of the debt.

THE COURT: Okay.

MR. BARKER: Maybe I would – I guess what I am really saying is maybe the Court would allow us maybe 10 days to submit something on –

THE COURT: That is what I was going to add.

MR. BARKER: Try to help the Court.

THE COURT: Right. You have submitted a Trial Brief. Do you want to submit anything else or –

MR. FRANKLIN: I would like to reserve the right to respond to Mr. Barker's brief.

THE COURT: All right.

MR. BARKER: You filed a Trial Brief?

(p. 11) MR. FRANKLIN: Yes.

MR. BARKER: Did I get a copy?

MR. FRANKLIN: Served only yesterday.

MR. BARKER: I haven't seen it.

THE COURT: Why don't I give you say, about 20 days to file any brief you wish and 10 days for response? How would that be?

MR. FRANKLIN: Thank you.

THE COURT: 20 days to defendant for brief, 10 days for response. All right, gentlemen, thank you.

COURT IN RECESS AT 2:41 P.M.

* * *

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE RECORD OF PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

/s/ Deanna J. Miller May 4, 1987
DEANNA J. MILLER

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Case No. 84-0516-CV-W-5

(Caption Omitted In Printing)

FIRST AMENDED COMPLAINT

As their claims for relief against the defendant Frank J. Garner, Jr., ("Garner"), the plaintiffs Coy Grogan ("Grogan") and John H. Henson ("Henson") state:

1. Grogan is an individual, a citizen of the United States, and is domiciled in Overland Park, Kansas; and Henson is an individual, a citizen of the United States, and is domiciled in El Reno, Oklahoma.

2. Garner is an individual, a citizen of the United States, and is domiciled in Kansas City, Missouri.

COUNT I

3. Jurisdiction over Counts I, II, and IV is invoked pursuant to 28 U.S.C. § 1332, as the plaintiffs are respectively citizens of the states of Kansas and Oklahoma, and defendant is a citizen of the state of Missouri, and the amount of controversy in this action exceeds $10,000.

4. In 1975 and 1976, Garner, Grogan, Henson, and others met, discussed, and agreed to organize a business (i) to inspect, repair, and refurbish railroad cars at several locations (the "Car Shops") and (ii) to mill and machine the wheels of railroad cars (the "Wheel Shop").

5. Garner, Grogan, Henson, and others were the original shareholders of Surface Transportation International, Inc., a Missouri corporation ("STI of Missouri"), organized in 1976 to operate the Car Shops and the Wheel Shop; and from the time of the organization of STI of Missouri it was agreed among the original shareholders that all opportunities for which the corporation was organized, including the operation of a Wheel Shop in the Kansas City metropolitan area, would be shared among the original shareholders in relative proportion to their shareholder interest.

6. Grogan and Henson each owned 10% of the common stock of STI of Missouri.

7. In 1978, Garner undertook to promote Surface Transportation International, Inc., a Kansas corporation ("STI of Kansas"), organized by Garner to operate the Wheel Shop.

8. In 1978, Garner represented to Grogan and Henson that:

(a) The sales price of the common stock of STI of Kansas was $40,000 for each 1% of the stock.

(b) It was the intent of Garner to afford Grogan and Henson, among other original shareholders of STI of Missouri, the opportunity to purchase the same portion of common stock in STI of Kansas as they held in STI of Missouri;

(c) It was the intent of Garner that STI of Kansas would be organized as a subsidiary corporation of STI of Missouri with STI of Missouri to retain ownership of 20-30% of STI of Kansas.

(d) It was the intent of Garner that the price of all common stock in STI of Kansas, whether sold to original STI of Missouri shareholders or others, was to be $40,000 for each 1% of the stock.

(e) The price of the common stock of STI of Kansas was set at $40,000 per 1% because working capital was needed to invest in equipment, property, tools, and other items.

(f) The North America Car Corp. was offering to buy Surface Transportation International, Inc., and its subsidiaries, including the Wheel Shop, for $300,000 in cash at closing and $2 million in notes or stock paid over a 10 year period.

9. Garner's representations to Grogan and Henson were false in that at the time he made the representations:

(a) The sales price of the common stock of STI of Kansas was not $40,000 for each 1% of the stock, rather, the stock was available for purchase by Garner, his family members and individuals in close association with Garner for little or no consideration;

(b) Garner intended to induce Grogan and Henson to forego the purchase of STI of Kansas stock by overstating the price of the stock;

(c) Garner intended to distribute the stock in STI of Kansas to himself, his family members, or to individuals in close association with Garner in return for no consideration or for a consideration substantially less than $40,000 per 1% of stock;

(d) Garner did not intend to reserve 20-30% of the ownership in STI of Kansas in STI of Missouri;

(e) It was never the intent of Garner to raise working capital from the subscription of stock; rather Garner planned to obtain the working capital needed to purchase equipment, property, tools, and other items needed for operation of the Wheel Shop from the issue of industrial revenue bonds.

(f) Garner intended to arrange the sale of the Wheel Shop to North American Car Corp. in a transaction separate from the sale of Surface Transportation International, Inc. and other affiliated corporations, with Garner and others to receive stock valued at $2.5 million in return for selling the Wheel Shop.

10. Garner knowingly made such false representations to induce Grogan and Henson to forego the purchase of stock in STI of Kansas.

11. At the time made, Grogan and Henson were unaware Garner's representations were false, and relying on Garner's representations concerning the distribution, the sale, and the price of STI of Kansas common stock, and his representation regarding the North American Car Corp. offer to purchase STI of Missouri and its affiliated companies, Grogan and Henson declined to exercise their contractual rights to purchase any common stock of STI of Kansas and approved the sale to North American Car Corp. of the stock of STI of Missouri.

12. Had Grogan or Henson known of the price at which Garner intended to sell stock in STI of Kansas and known of Garner's intention to transfer a significant portion of the ownership of STI of Kansas to himself, his family, or to those on whom he wished to bestow a benefit, each would have purchased 10% of the stock of STI of Kansas for the consideration for which the stock was sold or transferred.

13. As a direct and proximate result of Garner's misrepresentations, Grogan and Henson chose not to purchase stock in STI of Kansas and have thereby each been damaged; Garner acted willfully and maliciously in making the misrepresentations to Grogan and Henson and is liable to Grogan and Henson for punitive damages.

14. Until December of 1983, Grogan and Henson were unaware Garner's representations as to the sale of STI of Kansas stock and the sale of the Wheel Shop were false, and could not have discovered the representations

by reasonable diligence, because Garner offered the stock in STI of Kansas privately to selected individuals of his choice and concealed his offers and negotiations from Grogan and Henson. Grogan and Henson learned of Garner's misrepresentations only after it was revealed to them that certain individual shareholders of STI of Kansas did not pay $40,000 for a 1% interest in the corporation as a result of litigation between Garner and the purchaser of STI of Kansas, which discussions occurred in December of 1983.

15. In December of 1978 all of the stock of STI of Kansas was sold for the aggregate price of $2,537,825 and Garner received $1,700,342.73 for his interest in STI of Kansas.

WHEREFORE, on Count I of this Complaint, Grogan requests judgment in his favor against Garner in the amount of $250,000 in actual damages and $500,000 in punitive damages, and his costs, and other appropriate relief in this action, and Henson requests judgment in his favor against Garner in the amount of $250,000 in actual damages and $500,000 in punitive damages, and his costs, and other appropriate relief in this action.

COUNT II

16. Garner, because of his position as chief executive officer of STI of Missouri, his position as majority shareholder of STI of Missouri, his position as the incorporator and promoter of STI of Missouri and STI of Kansas, and his representations to Grogan and Henson that their interests in the wheel shop would not be diluted or lost, became a confident [sic] to Grogan and

Henson, and owed each a duty of fidelity and loyalty arising from the confidential relationship and fiduciary duties by virtue of Garner's position of control.

17. Garner breached his fiduciary duties to Grogan and Henson arising from their confidential relationships through the misrepresentations described in paragraph 8 above and by acquiring for himself, his family and for others who enjoyed his favor, the stock of STI of Kansas.

18. As the result of Garner's breach of his fiduciary duties arising from his confidential relationships with Grogan and Henson, Garner has been unjustly enriched in that Garner acquired and later sold 67% of the common stock in STI of Kansas, while preventing Grogan and Henson from acquiring the 10% stock to which each was entitled, and, Garner caused the distribution of shares in STI of Kansas to individuals who gave insufficient consideration for the stock.

WHEREFORE, on Count II of this Complaint, Grogan and Henson each request the Court: order an accounting of all proceeds Garner has received from the sale of STI of Kansas stock to which he is entitled because of the sale; enter judgment that Garner account to Grogan and Henson for all monies received by Garner through the sale of STI of Kansas stock; enter judgment against Garner for all sums found to be due Garner or Henson; impress a constructed trust upon assets of Garner purchased with money or property derived from the sale of stock in STI of Kansas; and grant Grogan and Henson such other relief as may be just together with the costs of this action.

COUNT III

19. Jurisdiction over Count III is invoked pursuant to 15 U.S.C. § 78aa and 78f, and 28 U.S.C. § 1331.

20. Under the terms of the agreement described in paragraphs 4 and 5 above, Grogan and Henson each had the right to receive an ownership interest in the Wheel Shop proportionate to the interest each held in STI of Missouri.

21. Through the use of interstate mail or telephone calls, or otherwise through the use of an interstate instrumentality, Garner made the representations stated in paragraph 8 above.

22. The representations were false for the reasons stated in paragraph 9 above, and Garner made the representations with intent to deceive Grogan and Henson regarding the sale of stock in STI of Missouri and affiliated corporations in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

23. Relying on Garner's representations and as a direct result of Garner's representations, Grogan and Henson declined to exercise their contractual rights to purchase stock in STI of Kansas and have been thereby damaged.

WHEREFORE, on Count III of this Complaint, Grogan requests judgment in his favor and against Garner in the amount of $250,000 in actual damages and for attorneys' fees and the costs relating to the prosecution of this action; and Henson requests judgment in his favor and against Garner in the amount of $250,000 in actual

damages and for attorneys' fees and the costs relating to the prosecution of this action.

COUNT IV

24. The misrepresentations by Garner described in paragraphs 8 through 13 above constituted an offer to sell a security by means of an untrue statement of a material fact in violation of § 409.411(a)(2), R.S. Mo. 1978.

25. Grogan and Henson are entitled to damages for Garner's violation of § 409.411(a)(2).

WHEREFORE, on Count IV of this Complaint, Grogan requests judgment in his favor and against Garner in the amount of $250,000 and an award of attorneys' fees and the costs relating to the prosecution of this action; and Henson requests judgment in his favor and against Garner in the amount of $250,000 and for an award of attorneys' fees and the costs relating to the prosecution of this action.

COUNT V

26. Jurisdiction over Count IV is invoked pursuant to 18 U.S.C. § 1964 and 28 U.S.C. § 1331.

27. In a letter to Grogan and in a letter to Henson both dated May 12, 1978, Garner made the representations in paragraph 8 above.

28. Garner caused the two letters to be delivered by the United States Postal Service in furtherance of a scheme or artifice, as described in 18 U.S.C. § 1341, devised by Garner with the intent top [sic] assume

unlawfully the ownership and control over the Wheel Shop, a property and right of STI of Missouri and a corporation in which Grogan and Henson were shareholders.

29. Garner's incorporation of STI of Kansas to acquire ownership and control over the wheel shop constituted the engagement of an enterprise, as defined in 18 U.S.C. § 1961 (4), in interstate commerce with the intent to cause commercial injury through the unlawful acquisition of control in violation of 18 U.S.C. § 1962 (c).

30. Garner's use of the Postal Service to deliver the two letters and other documents constituted two separate acts in violation of 18 U.S.C. § 1341, and constituted a pattern of unlawful activity in violation of 18 U.S.C. § 1961(5).

31. As a direct and proximate result of Garner's violation of 18 U.S.C. § 1962(c), Grogan and Henson have been individually damaged.

WHEREFORE, on Count V of this Complaint, Grogan requests judgment in his favor and against Garner in the amount of $750,000 and an award of attorneys' fees and the costs relating to the prosecution of this action; and Henson requests judgment in his favor and against Garner in the amount of $750,000 and for an award of attorneys' fees and the costs relating to the prosecution of this action.

(Signatures And Certificate Of Service
Omitted In Printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2098WM

(Caption Omitted In Printing)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

ADDENDUM TO
BRIEF OF THE APPELLANT
FRANK J. GARNER, JR.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeals Court No. 85-2098WM

(Caption Omitted In Printing)

ADDENDUM
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JUDGMENT IN A CIVIL CASE

(FILED May 8, 1985)

UNITED STATES DISTRICT COURT

CASE TITLE

COY R. GROGAN, et al.,

Plaintiffs,

v.

FRANK J. GARNER, JR.,

Defendant.

DISTRICT
WESTERN DISTRICT OF MISSOURI

DOCKET NUMBER
84 - 0516 - CV - W - 5

NAME OF JUDGE
SCOTT O. WRIGHT

X **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That on the claim of Coy Grogan against Frank J. Garner, Jr. for common law fraud, the jury unanimously

finds in favor of Coy Grogan and finds the actual damages at $249,000.00 and assesses the punitive damages to be awarded to plaintiff Coy Grogan at $24,900.00.

That on the claim of Coy Grogan against Frank J. Garner, Jr. for breach of fiduciary duty, the jury unanimously finds in favor of Coy Grogan and finds the actual damages at $249,000.00.

That on the claim of Coy Grogan against Frank J. Garner, Jr. for violation of Securities Exchange Act of 1934, the jury unanimously finds in favor of Coy Grogan and finds the actual damages at $249,000.00.

That on the claim of Coy Grogan against Frank J. Garner, Jr. for violation of Section 1962 of RICO, the jury unanimously finds in favor of Frank J. Garner, Jr. and finds actual damages to be none.

Entered On 5/8/85

ORIGINAL

CLERK

R.F. Connor

(BY) DEPUTY CLERK

C. Morrison

DATE
5/8/85

JUDGMENT IN A CIVIL CASE
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_ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That on the claim of John Henson against Frank J. Garner, Jr. for common law fraud, the jury unanimously finds in favor of John Henson and finds the actual damages at $249,000.00 and assesses the punitive damages to be awarded to plaintiff John Henson at $24,900.00.

That on the claim of John Henson against Frank J. Garner, Jr. for breach of fiduciary duty, the jury unanimously finds in favor of John Henson and finds the actual damages at $249,000.00.

That on the claim of John Henson against Frank J. Garner, Jr. for violation of Securities Exchange Act of 1934, the jury unanimously finds in favor of John Henson and finds the actual damages at $249,000.00.

That on the claim of John Henson against Frank J. Garner, Jr. for violation of Section 1962 of RICO, the jury unanimously finds in favor of Frank J. Garner, Jr. and finds the actual damages to be none.

Entered 5/8/85

ORIGINAL

CLERK
R. F. CONNOR

(BY) DEPUTY CLERK

C. MORRISON

DATE

5/8/85

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

COY R. GROGAN and JOHN H. HENSON,	)	
Plaintiffs,	)	No. 84-0516-CV-W-5
vs.	)	
FRANK J. GARNER, JR.,	)	
Defendant.	)	

ORDER

(Filed Aug. 7, 1985)

Pending before the Court are various post-trial motions. The Court will issue the following rulings:

1. Defendant's motion for judgment notwithstanding the verdict and alternative motion for a new trial will be overruled. The jury's verdict must be upheld if, viewing the evidence in a light most favorable to the prevailing party, reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 343 (8th Cir. 1983). Here, there clearly was sufficient evidence to

support the jury's conclusion that defendant violated his fiduciary duty and intentionally defrauded plaintiffs. In addition, the Court stands by its evidentiary rulings and the jury instructions which were given in this case.

2. Defendant's motion to alter or amend the judgment to preclude the possibility of double recovery by plaintiff will be sustained, but defendant's motion will be overruled to the extent that it seeks to force an election of legal theories by plaintiffs. At the conclusion of trial, the jury returned verdicts in favor of plaintiffs on three of their four legal theories and awarded actual damages of $249,000 to each plaintiff under each theory. In addition, the jury awarded $24,900 in punitive damages to each plaintiff under their common law fraud theory. Plaintiffs concede that they are not entitled to more than one actual damage award because all three awards correspond to a single injury. The judgment herein will be modified to reflect that fact. Nevertheless, there is no reason to require plaintiffs to elect under which legal theory they will collect the judgment. So long as it is clear that plaintiffs may not recover more than $249,000 in actual damages, there is no need to specify which theory this award is based on.

3. Plaintiff's motion for an award of prejudgment interest will be sustained *only* with respect to their claim under § 10(b) of the Securities Exchange Act of 1934. Plaintiffs concede that they cannot recover prejudgment interest with respect to their state law claims. *See Herberholt v. DePaul Community Health Center*, 648 S.W.2d 160, 162 (Mo. Ct. App. 1983) (prejudgment interest disallowed on claims for unliquidated damages). Nevertheless, plaintiffs contend that an award of prejudgment interest on

their federal securities fraud claim is appropriate in order to prevent the unjust enrichment of defendant. The Court agrees. While state law governs the issue of prejudgment interest on state law claims, *see Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385 (8th Cir. 1983), federal law applies with respect to federal claims. As a matter of federal law, "prejudgment interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Blau v. Lehman*, 368 U.S. 403, 414 (1962). Although prejudgment interest should not be allowed "when its exaction would be inequitable," *id.*, it should be allowed whenever necessary to prevent the unjust enrichment of the defendant. *See Hodgson v. American Can Co.*, 440 F.2d 916, 920 (8th Cir. 1971); *see also General Facilities, Inc. v. National Marine Service, Inc.*, 664 F.2d 672, 674 (8th Cir. 1981). The decision of whether to award prejudgment interest is a matter of discretion for the trial court. *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 744 (8th Cir. 1965). Here, the Court finds that the damages sustained by plaintiffs were reasonably capable of ascertainment at the time of the illegal act. In addition, the Court believes that an award of prejudgment interest is necessary in order to fully compensate plaintiffs and to prevent the unjust enrichment of defendant. It bears emphasis that defendant has had the unfettered use of the ill-gotten money between the time of the illegal act and the date of the judgment. Under these circumstances, the Court will sustain plaintiffs' motion for an award of prejudgment interest between April 17, 1979 and the date of the judgment herein at a rate of nine percent per annum. *See Folz v. Marriott Corp.*, 594 F. Supp. 1007,

1016-17 (W.D. Mo. 1984); *see generally Behlar v. Smith*, 719 F.2d 950, 954 (8th Cir. 1983).

In accordance with the foregoing, it is hereby

ORDERED that defendant's motion for judgment notwithstanding the verdict and alternative motion for a new trial are overruled. It is further

ORDERED that defendant's motion to alter or amend the judgment is sustained in part and overruled in part. The judgment is amended to provide that each plaintiff may not recover more than $249,000 for actual damages. However, plaintiffs need not specify the legal theory under which they will collect their judgments. It is further

ORDERED that plaintiffs' motion for awards of prejudgment interest on their claims under § 10(b) of the Securities Exchange Act of 1934 is sustained. Each plaintiff is entitled to prejudgment interest in the amount of nine percent per annum beginning April 17, 1979, on their § 10(b) claims only. No prejudgment interest is allowed on plaintiffs' state law claims. It is further

ORDERED defendant's motion for an enlargement of time to file suggestions in opposition to plaintiffs' motion for prejudgment interest is sustained and the same shall be deemed filed May 21, 1985. It is further

ORDERED that defendant's motion for a stay of execution is overruled as being moot. It is further

ORDERED that defendant's motion to quash, filed July 29, 1985, is overruled as being moot.

/s/ Scott O. Wright
SCOTT O. WRIGHT

UNITED STATES DISTRICT JUDGE

August 7, 1985.

AMENDED

JUDGMENT IN A CIVIL CASE
(Filed Aug. 21, 1985)

UNITED STATES DISTRICT COURT

CASE TITLE

Coy Grogan, et al

v.

Frank J. Garner

DISTRICT

WESTERN DISTRICT OF MISSOURI

DOCKET NUMBER

84-0516-CV-W-5

NAME OF JUDGE OR MAGISTRATE

Scott O. Wright

X **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The judgment of May 1, 1985 having been entered on the docket on May 8, 1985, it is hereby amended and clarified to provide that each plaintiff may not recover more than $249,000 for actual damages. However, plaintiffs need not specify the legal theory under which they will collect their judgments. Each plaintiff is entitled to prejudgment interest in the amount of nine percent (9%) per annum beginning April 17, 1979, on their § (b) of the Securities Exchange Act of 1934 claims only. No prejudgment interest is allowed on plaintiffs' state law claims.

Entered on 8/21/85

CLERK

R. F. Connor

(BY) DEPUTY CLERK

Don Hendrix

DATE

8/21/85

INSTRUCTION NUMBER 4A

Upon returning to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in court.

The court has prepared separate Forms of Verdict with respect to the claims of each plaintiff, which forms of verdict contain directions for completion and will allow you to return permissible verdicts in this case.

Plaintiffs seek to recover damages for each separate claim asserted by them, whether based on common law fraud, breach of fiduciary duty, or federal statutes. You should consider the question of actual damages only with respect to those claims on which you find the issues in favor of the plaintiff or plaintiffs. If you find the issues in favor of a plaintiff on more than one of his claims, the damages which you may find may be based on the same economic injury. The law does not permit a plaintiff to recover more than once for an economic injury, regardless of the number of claims or the legal theories on which the right to damages is based. However, if you find the issues

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in favor either [sic] plaintiff on more than one of their respective claims, you should not attempt to apportion or divide the total amount of damages between such claims. You should consider and determine the total amount of damages separately with respect to each claim on which you find the issues in favor of plaintiffs. The court will take the necessary action after you return a verdict to avoid the possibility of awarding plaintiffs more than the total amount of their actual damages if you return a verdict for plaintiffs on more than one of their claims.

You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdict with respect to each of the claims of each of the plaintiffs, you will have your foreperson fill in, date and sign the form which sets forth the verdict upon which unanimously [sic] agree; and then return with your verdict to the courtroom.

Devitt & Blackmar § 74.04

Submitted by Plaintiffs

INSTRUCTION NUMBER 6

Your verdict must be for the plaintiff Grogan on his claim of the common law fraud for misrepresentation if you believe:

First: The defendant represented to plaintiff Grogan that North American Car Corp. was offering to buy Surface Transportation International, and its subsidiaries, including the Wheel Shop, for approximately $2.3 million, intending that plaintiff Grogan rely

upon such representation in approving the acquisition of Surface Transportation International, Inc. by North American Car Corporation; and

Second: That the representation was false; and

Third: That the defendant knew his representation was false; and

Fourth: That this representation was material to plaintiff Grogan's decision to approve the acquisition of Surface Transportation International, Inc. by North American Car Corp.; and

Fifth: That plaintiff Grogan relied on defendant's representation in deciding to approve the acquisition of Surface Transportation International, Inc. by North American Car Corp.; and

Sixth: That as a direct result of such representation plaintiff Grogan sustained damages;

Your verdict must be for the defendant on plaintiff Grogan's claims of common law fraud if you believe plaintiff Grogan actually discovered the alleged acts of fraud before May 7, 1979.

INSTRUCTION NUMBER 7

Your verdict must be for the plaintiff Grogan on his claim of common law fraud for failure to disclose material facts if you believe:

First: The defendant failed to disclose to plaintiff Grogan that defendant and others who would purchase stock in the wheel shop would receive an additional payment of approximately $2.5 million for their stock; and

Second: That defendant failed to disclose these facts intending that plaintiff Grogan not be informed of such facts in deciding whether to approve the acquisition of Surface Transportation International, Inc., by North American Car Corp.; and

Third: These facts were substantially likely to affect or influence the plaintiff Grogan's decision to approve the acquisition of Surface Transportation International, Inc. to North American Car Corp.; and

Fourth: As a direct result of the failure to disclose these facts plaintiff Grogan was damaged;

Your verdict must be for the defendant on plaintiff Grogan's claims of common law fraud if you believe plaintiff Grogan actually discovered the alleged acts of fraud before May 7, 1979.

INSTRUCTION NUMBER 8

Your verdict must be for plaintiff Grogan on his claim of breach of fiduciary duty if the believe:

First: That defendant:

(1) represented to plaintiff Grogan that the sale of the stock of Surface Transportation International, Inc. to North American Corporation included the sale of the Wheel Shop, with the intention of inducing plaintiff Grogan to approve an acquisition in which the defendant profited in a manner not revealed to plaintiff Grogan, or

(2) failed to disclose to plaintiff Grogan that the defendant, and others with his consent, would purchase stock in the Wheel Shop for $1.00 per share, with the intention of selling that stock to

North American Car Corporation at a substantial profit at the same time the plaintiff Grogan sold his stock in Surface Transportation International, Inc., and

Second: By engaging in one or both of these acts or omissions, defendant failed to discharge fiduciary duties he owed to plaintiff Grogan as described in Instruction 9; and

Third: As a direct result of such acts, plaintiff Grogan was damaged;

Unless you believe plaintiff is not entitled to recover by reason of Instruction Number 10.

INSTRUCTION NUMBER 9

A director or officer of a corporation is a fiduciary to the corporation and to its shareholders. A fiduciary occupies a position of highest trust and confidence, and the utmost good faith is required when an officer or director exercises powers conferred by the corporation.

The fiduciary duties of an officer or director of a stock corporation include the following:

1. An officer or director may not cause issuance of stock for personal gain if the activities are to the detriment of the shareholders.

2. An officer or director has a duty to disclose fully and fairly all material facts to shareholders concerning transactions of the shareholder in stock of the company. Material facts are facts which are substantially likely to

affect a reasonable shareholder's decision in connection with the sale of her or his stock. This also means an officer or director has a continuing duty to disclose material facts so long as the facts are material to the shareholder's dealings in the stock of the corporation. If material facts change then the officer or director has a duty to reveal the changed circumstances.

3. A corporate officer or director is under a fiduciary duty not to divert a corporate business opportunity for his personal gain. In other words, if a business opportunity exists, an officer or director may not appropriate it for himself or divert it to another business entity in which he has an interest if the business opportunity presented is: (i) closely related to the business of the corporation, (ii) one which the corporation might naturally be expected to expend, (iii) one in which the corporation has the financial ability to undertake and (iv) includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel and the ability to pursue.

4. A corporate director or officer will not be permitted to make a private or secret profit from his official position with the corporation. Officers and directors occupy a trust relationship with the corporation's shareholders, and any personal profit of officers or directors at the expense of the shareholders violates the fiduciary duty unless good faith and fairness in the dealing appear from the evidence.

INSTRUCTION NUMBER 10

Your verdict must be for the defendant on plaintiff Grogan's claim of breach of fiduciary duties if you believe plaintiff actually discovered or, in the exercise of reasonable diligence, should have discovered defendant's breach of his fiduciary duties before May 7, 1979.

INSTRUCTION NUMBER 11

It is unlawful under Section 10(b) of the Securities and Exchange Act of 1934 to do any of the following things, directly or indirectly, in connection with the purchase or sale of any security:

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

INSTRUCTION NUMBER 12

Your verdict must be for plaintiff Grogan on his claim the defendant violated § 10(b) of the Securities Exchange Act of 1934 if you believe:

First: That the defendant:

(1) knowingly failed to disclose to plaintiff Grogan that stock in the Wheel Shop would be sold to other individuals at a purchase price substantially less than the offer to plaintiff, intending to conceal this information from plaintiff Grogan to induce him to approve the sale of his stock in Surface Transportation International, Inc. to North American Car Corp.; or

(2) knowingly misrepresented to plaintiff Grogan that Surface Transportation International, Inc., and its subsidiaries, including the Wheel Shop, were to be sold to North American Car Corporation for approximately $2.3 million, intending to mislead or deceive plaintiff Grogan into believing that the Wheel Shop was part of the sales transaction for which he would receive his proportionate share as a stockholder of Surface Transportation International, Inc.; or

(3) knowingly failed to disclose to plaintiff Grogan that the Wheel Shop was to be sold for an additional payment of approximately $2.5 million at the same time that Surface Transportation International, Inc. was to be sold, intending that the plaintiff Grogan would be misled or deceived and would approve the sale of his stock in Surface Transportation International, Inc. to North American Car Corp. without knowledge of the Wheel Shop transaction; and

Second: There is a substantial likelihood that the facts which were misrepresented or concealed by defendant are facts on which a reasonable person would have relied; and

Third: That, in making the decision to sell his stock in Surface Transportation International, Inc., plaintiff Grogan relied on such statements of defendant; and

Fourth: That, as a direct result of defendant's conduct as submitted in this instruction, plaintiff Grogan was damaged;

Unless you believe the plaintiff is not entitled to recover by reason of Instruction Number 13.

An act or omission is 'knowingly' done if done voluntarily and intentionally, and not because of a mistake or accident or other innocent reason.

INSTRUCTION NUMBER 13

Your verdict must be for the defendant on plaintiff Grogan's claim of violation of § 10(b) of the Securities Exchange Act of 1934 if you believe plaintiff Grogan actually discovered or in the exercise of reasonable diligence, should have discovered the alleged violation or violations of the federal securities law before May 7, 1982.

INSTRUCTION NUMBER 20

In the event you find in favor of the plaintiff Grogan on one or more of his claims against defendant, then you must consider the question of damages with respect to each claim on which you find in favor of the plaintiff Grogan. Damages may not be based on speculation, and the burden is on the plaintiff Grogan to prove the damage claimed.

However, the burden on the plaintiff to prove his damages by a preponderance of the evidence does not require that he prove with mathematical precision the exact sum of his damage, but only that he furnish evidence of such facts and circumstances to permit an intelligent and probable estimate of those damages.

In this case, the plaintiff Grogan claims that the acts of the defendant submitted to you in these instructions caused him to obtain less for his stock in Surface Transportation International, Inc. than he would have received but for the conduct of the defendant. The correct measure of damages in this case is the difference between the fair value of all that plaintiff Grogan received in connection with the sale of his stock in Surface Transportation International, Inc. and the fair value of what he would have received had there been no unlawful conduct on the part of defendant.

INSTRUCTION NUMBER 21

If you find the issues in favor of the plaintiff Grogan on his claims against defendant based on common law fraud, and if you believe the conduct of the defendant as submitted to you in my instructions with respect to common law fraud was willful, wanton, or malicious, then, in addition to any actual damages to which you find plaintiff or plaintiffs entitled based on the claim of common law fraud, you may also award the plaintiff an additional amount as punitive damages in such sum as you believe

will serve to punish defendant and to deter him and others from like conduct.

The term "malicious" as used in this instruction does not mean hatred, spite, or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse.

VERDICT A

COMMON LAW FRAUD

On the claim of Coy Grogan against Frank J. Garner, Jr. for common law fraud, we unanimously find in favor of:

(List either Coy Grogan or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Coy Grogan

We unanimously find the actual damages of plaintiff Coy Grogan on his claim for common law fraud at $_____ (stating amount or, if none, write the word "none").

We unanimously assess the punitive damages to be awarded to plaintiff Coy Grogan at $_____ (stating amount or, if none, write the word "none").

BREACH OF FIDUCIARY DUTY

On the claim of Coy Grogan against Frank J. Garner, Jr. for breach of fiduciary duty, we unanimously find in favor of:

(List either Coy Grogan or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Coy Grogan

We unanimously find the actual damages of plaintiff Coy Grogan on his claim for breach of fiduciary duty at $_____ (stating amount or, if none, write the word "none").

VIOLATION OF SECURITIES EXCHANGE ACT OF 1934

On the claim of John Henson against Frank J. Garner, Jr. for violation of Securities Exchange Act of 1934, we unanimously find in favor of:

(List either John Henson or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff John Henson

We unanimously find the actual damages of plaintiff John Henson on his claim for violation of Securities Exchange Act of 1934 at $_____ (stating amount or, if none, write the word "none").

CIVIL RICO

On the claim of John Henson, against Frank J. Garner, Jr. for violation of Section 1962 of RICO, we unanimously find in favor of:

_____

(List either John Henson or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff John Henson

We unanimously find the actual damages of plaintiff John Henson on his claim for violation of Section 1962 of RICO at $_____ (stating amount or, if none, write the word "none").

The foregoing is the unanimous verdict of the jury.

_____

Foreperson

Date: _____

INSTRUCTION NUMBER 23

Your verdict must be for the plaintiff Henson on his claim of the common law fraud for misrepresentation if you believe:

First: The defendant represented to plaintiff Henson that North American Car Corp. was offering to buy Surface Transportation International, and its subsidiaries, including the Wheel

Shop, for approximately $2.3 million, intending that plaintiff Henson rely upon such representation in approving the acquisition of Surface Transportation International, Inc. by North American Car Corporation; and

Second: That the representation was false; and

Third: That the defendant knew his representation was false; and

Fourth: That this representation was material to plaintiff Henson's decision to approve the acquisition of Surface Transportation International, Inc. by North American Car Corp.; and

Fifth: That plaintiff Henson relied on defendant's representation in deciding to approve the acquisition of Surface Transportation International, Inc. by North American Car Corp.; and

Sixth: That as a direct result of such representation plaintiff Henson sustained damages;

Your verdict must be for the defendant on plaintiff Henson's claims of common law fraud if you believe plaintiff Henson actually discovered the alleged acts of fraud before May 7, 1979.

INSTRUCTION NUMBER 24

Your verdict must be for the plaintiff Henson on his claim of common law fraud for failure to disclose material facts if you believe:

First: The defendant failed to disclose to plaintiff Henson that defendant and others who would purchase stock in the wheel shop would receive

an additional payment of approximately $2.5 million for their stock; and

Second: That defendant failed to disclose these facts intending that plaintiff Henson not be informed of such facts in deciding whether to approve the acquisition of Surface Transportation International, Inc., by North American Car Corp.; and

Third: These facts were substantially likely to affect or influence the plaintiff Henson's decision to approve the acquisition of Surface Transportation International, Inc. to North American Car Corp.; and

Fourth: As a direct result of the failure to disclose these facts plaintiff Henson was damaged;

Your verdict must be for the defendant on plaintiff Henson's claims of common law fraud if you believe plaintiff Henson actually discovered the alleged acts of fraud before May 7, 1979.

INSTRUCTION NUMBER 25

Your verdict must be for plaintiff Henson on his claim of breach of fiduciary duty if you believe:

First: That defendant

(1) represented to plaintiff Henson that the sale of the stock of Surface Transportation International, Inc. to North American Car Corporation included the sale of the Wheel Shop, with the intention of inducing plaintiff Henson to approve an acquisition in

which the defendant profited in a manner not revealed to plaintiff Henson, or

(2) failed to disclose to plaintiff Henson that the defendant, and others with his consent, would purchase stock in the Wheel Shop for $1.00 per share, with the intention of selling that stock to North American Car Corporation at a substantial profit at the same time the plaintiff Henson sold his stock in Surface Transportation International, Inc., and

Second: By engaging in one or both of these acts or omissions, defendant failed to discharge fiduciary duties he owed to plaintiff Henson as described in Instruction 26; and

Third: As a direct result of such acts, plaintiff Henson was damaged;

Unless you believe the plaintiff is not entitled to recover by reason of Instruction Number 27.

INSTRUCTION NUMBER 26

A director or officer of a corporation is a fiduciary to the corporation and to its shareholders. A fiduciary occupies a position of highest trust and confidence, and the utmost good faith is required when an officer or director exercises powers conferred by the corporation.

The fiduciary duties of an officer or director of a stock corporation include the following:

1. An officer or director may not cause issuance of stock for personal gain in the activities are to the detriment of the shareholders.

2. An officer or director has a duty to disclose fully and fairly all material facts to shareholders concerning transactions of the shareholder in stock of the company. Material facts are facts which are substantially likely to affect a reasonable shareholder's decision in connection with the sale of her or his stock. This also means an officer or director has a continuing duty to disclose material facts so long as the facts are material to the shareholder's dealings in the stock of the corporation. If material facts change then the officer or director has a duty to reveal the changed circumstances.

3. A corporate officer or director is under a fiduciary duty not to divert a corporate business opportunity for his personal gain. In other words, if a business opportunity exists, an officer or director may not appropriate it for himself or divert it to another business entity in which he has an interest if the business opportunity presented is: (i) closely related to the business of the corporation, (ii) one which the corporation might naturally be expected to expend, (iii) one in which the corporation has the financial ability to undertake and (iv) includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel and the ability to pursue.

4. A corporate director or officer will not be permitted to make a private or secret profit from his official position with the corporation. Officers and directors

occupy a trust relationship with the corporation's shareholders, and any personal profit of officers or directors at the expense of the shareholders violates the fiduciary duty unless good faith and fairness in the dealing appear from the evidence.

INSTRUCTION NUMBER 27

Your verdict must be for the defendant on plaintiff Henson's claim of breach of fiduciary duties if you believe plaintiff actually discovered or, in the exercise of reasonable diligence, should have discovered defendant's breach of his fiduciary duties before May 7, 1979.

INSTRUCTION NUMBER 28

It is unlawful under Section 10(b) of the Securities and Exchange Act of 1934 to do any of the following things, directly or indirectly, in connection with the purchase or sale of any security:

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

INSTRUCTION NUMBER 29

Your verdict must be for plaintiff Henson on his claim the defendant violated § 10(b) of the Securities Exchange Act of 1934 if you believe:

First: That the defendant:

(1) knowingly failed to disclose to plaintiff Henson that stock in the Wheel Shop would be sold to other individuals at a purchase price substantially less than the offer to plaintiff, intending to conceal this information from plaintiff Henson to induce him to approve the sale of his stock in Surface Transportation International, Inc. to North American Car Corp.; or

(2) knowingly misrepresented to plaintiff Henson that Surface Transportation International, Inc., and its subsidiaries, including the Wheel Shop, were to be sold to North American Car Corporation for approximately $2.3 million, intending to mislead or deceive plaintiff Henson into believing that the Wheel Shop was part of the sales transaction for which he would receive his proportionate share as a stockholder of Surface Transportation International, Inc.; or

(3) knowingly failed to disclose to plaintiff Henson that the Wheel Shop was to be sold for an additional payment of approximately $2.5 million at the same time that Surface Transportation International, Inc. was to be sold, intending that the plaintiff Henson would be misled or deceived and would approve the sale of his stock in Surface Transportation International,

Inc. to North American Car Corp. without knowledge of the Wheel Shop transaction; and

Second: There is a substantial likelihood that the facts which were misrepresented or concealed by defendant are facts on which a reasonable person would have relied; and

Third: That, in making the decision to sell his stock in Surface Transportation International, Inc., plaintiff Henson relied on such statements of defendant; and

Fourth: That, as a direct result of defendant's conduct as submitted in this instruction, plaintiff Henson was damaged;

Unless you believe the plaintiff is not entitled to recover by reason of Instruction Number 30.

An act or omission is 'knowingly' done if done voluntarily and intentionally, and not because of a mistake or accident or other innocent reason.

INSTRUCTION NUMBER 30

Your verdict must be for the defendant on plaintiff Henson's claim of violation of § 10(b) of the Securities Exchange Act of 1934 if you believe plaintiff Henson actually discovered or in the exercise of reasonable diligence, should have discovered the alleged violation or violations of the federal securities law before May 7, 1982.

INSTRUCTION NUMBER 37

In the event you find in favor of the plaintiff Henson on one or more of his claims against defendant, then you must consider the question of damages with respect to each claim on which you find in favor of the plaintiff Henson. Damages may not be based on speculation, and the burden is on the plaintiff Henson to prove the damage claimed.

However, the burden on the plaintiff to prove his damages by a preponderance of the evidence does not require that he prove with mathematical precision the exact sum of his damage, but only that be furnish evidence of such facts and circumstances to permit an intelligent and probable estimate of those damages.

In this case, the plaintiff Henson claims that the acts of the defendant submitted to you in these instructions caused him to obtain less for his stock in Surface Transportation International, Inc. than he would have received but for the conduct of the defendant. The correct measure of damages in this case is the difference between the fair value of all that plaintiff Henson received in connection with the sale of his stock in Surface Transportation International, Inc. and the fair value of what he would have received had there been no unlawful conduct on the part of defendant.

INSTRUCTION NUMBER 38

If you find the issues in favor of the plaintiff Henson on his claims against defendant based on common law fraud, and if you believe the conduct of the defendant as submitted to you in my instructions with respect to common law fraud was willful, wanton, or malicious, then, in addition to any actual damages to which you find plaintiff or plaintiffs entitled based on the claim of common law fraud, you may also award the plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter him and others from like conduct.

The term "malicious" as used in this instruction does not mean hatred, spite, or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse.

VERDICT B

COMMON LAW FRAUD

On the claim of John Henson against Frank J. Garner, Jr. for common law fraud, we unanimously find in favor of:

_____

(List either John Henson or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff John Henson

We unanimously find the actual damages of plaintiff John Henson on his claim for common law fraud at $_____ (stating amount or, if none, write the word "none").

We unanimously assess the punitive damages to be awarded to plaintiff John Henson at $_____ (stating amount or, if none, write the word "none").

BREACH OF FIDUCIARY DUTY

On the claim of John Henson against Frank J. Garner, Jr. for breach of fiduciary duty, we unanimously find in favor of:

_____

(List either John Henson or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff John Henson

We unanimously find the actual damages of plaintiff John Henson on his claim for breach of fiduciary duty at $_____ (stating amount or, if none, write the word "none").

VIOLATION OF SECURITIES EXCHANGE ACT OF 1934

On the claim of Coy Grogan against Frank J. Garner, Jr. for violation of Securities Exchange Act of 1934, we unanimously find in favor of:

_____

(List either Coy Grogan or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Coy Grogan

We unanimously find the actual damages of plaintiff Coy Grogan on his claim for violation of Securities Exchange Act of 1934 at $_____ (stating amount).

CIVIL RICO

On the claim of Coy Grogan against Frank J. Garner, Jr. for violation of Section 1962 of RICO, we unanimously find in favor of:

_____

(List either Coy Grogan or Frank J. Garner, Jr.)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Coy Grogan

We unanimously find the actual damages of plaintiff Coy Grogan on his claim for violation of Section 1962 of RICO at $_____ (stating amount or, if none, write the word "none").

The foregoing is the unanimous verdict of the jury.

_____

Foreperson

Date: _____

_____

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2098

(Caption Omitted in Printing)

Appeal from the United States
District Court for the
Western District of Missouri.

Submitted: June 9, 1986
Filed: December 8, 1986

Before LAY, Chief Judge, ARNOLD, Circuit Judge, and STROM,* District Judge.

LAY, Chief Judge.

Coy R. Grogan and John H. Henson brought this diversity action against Frank J. Garner, Jr., alleging that

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* The HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska, sitting by designation.

Garner committed common law fraud, breached his fiduciary duties, and violated § 10(b) of the Securities Exchange Act of 1934. The suit arises from the sale by Garner of stock in STI-Kansas to North American Car Corporation (NACC). A jury returned a verdict for Grogan and Henson and awarded $249,000 actual damage on each of three counts as well as punitive damages of $24,900 on the fraud claim.

After the jury returned its verdict and the judgment was filed, Grogan and Henson filed a motion for an award of prejudgment interest on the judgment. Garner moved for a judgment notwithstanding the verdict or a new trial and to amend the judgment as duplicitous. The court[1] held that Grogan and Henson individually could receive no more than $249,000 in actual damages and $24,900 for punitive damages on the fraud claim but did not require the plaintiffs to elect the count upon which the judgment for actual damages was based. The court also awarded prejudgment interest only as to the § 10(b) claim at nine percent per annum from April 17, 1979, to the date of the judgment. Garner appeals.

Facts

Our review of the record in the light most favorable to the verdict holder, *Lowe v. E.I. Dupont DeNemours Co.*, 802 F.2d 310, 311 (8th Cir. 1986), reveals the following

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[1] The Honorable Scott O. Wright, United States District Court for the Western District of Missouri, presiding.

facts. STI-Missouri was a Missouri corporation established by Frank Garner, Jr., in 1976. Garner's son, Franklin III, originally was the sole stockholder and president of the corporation. The elder Garner eventually began working full-time for STI-Missouri, at which time his son relinquished all capital stock in the corporation to his father. In 1976, Garner invited both Grogan and Henson to join STI-Missouri as employees in return for 100 shares, approximately ten percent, of the company stock. Grogan and Henson accepted the offer and paid approximately $800 each for their shares. At the same time, several other individuals also became minority shareholders in the corporation.[2] Garner retained approximately fifty-five percent of STI-Missouri shares, and until the time the corporation was sold, he served as president and chief executive officer.

In 1977, Garner began investigating the possibility of forming a wheel shop to supply wheels for the railcars that STI-Missouri repaired and refurbished. Garner estimated that startup costs would total 3.5 to 4 million dollars. However, he needed $50,000 immediately for a down payment on equipment and construction. Garner

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[2] STI-Missouri shares were distributed as follows:

Frank Garner, Jr. – 600 shares
John Buffalo – 100 shares
Tom Garner – 100 shares
Coy Grogan – 100 shares
John Henson – 100 shares
Raymond Guzak – 25 shares
Robert Guzak – 25 shares
Charles Pitts – 25 shares
Douglas Weitzman – 25 shares

obtained the approval of STI-Missouri shareholders to have STI-Missouri borrow $100,000 so that funds could be loaned to STI-Kansas by STI-Missouri.[3] The STI-Kansas debt was carried as an account receivable on STI-Missouri's books, thereby enhancing the net worth of STI-Missouri.

In January, 1978, NACC expressed to Garner its interest in buying STI-Missouri's car shops, which by then were located in several states. After two and one-half months of negotiations, NACC discontinued its efforts to buy the company. At the same time, Garner was still attempting to raise working capital for STI-Kansas. He notified all STI-Missouri shareholders in May, 1978, that he would like to incorporate STI-Kansas and that shareholders of STI-Missouri could purchase one percent of STI-Kansas for $40,000, with STI-Missouri retaining twenty to thirty percent of STI-Kansas stock. All STI-Missouri shareholders, including Grogan and Henson, declined Garner's offer, and Garner did not further pursue this plan.

On October 10, 1978, Garner notified all shareholders of the annual STI-Missouri shareholders meeting. In his letter, Garner stated that the meeting was for the purpose of reviewing the company's financial position and discussing the status of the wheel shop and other subsidiary car shops. In the meantime, NACC had expressed renewed interest in purchasing STI-Missouri and its affiliates, including the wheel shop. On October 17, 1978,

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[3] Garner collateralized the loan with personal farm property.

NACC presented Garner with a letter of intent to purchase STI-Missouri, a number of the car shops, and the wheel shop. The sale was subject to final approval of NACC's board of directors and all shareholders of the STI enterprise. Because he now had a firm offer from NACC, Garner testified, he contacted each STI-Missouri shareholder by telephone and urged him to attend the October 21 meeting. Both Grogan and Henson attended.

On September 26, 1978, approximately one month before the shareholders meeting, STI-Kansas was incorporated, with Garner as its sole shareholder. At the time of incorporation, STI-Kansas remained unfunded and indebted to STI-Missouri. Grogan and Henson both testified that they were unaware of either the incorporation or of Garner's status as sole stockholder. On September 30, Garner purchased 500 shares of STI-Kansas common stock for one dollar per share, and on October 17, he purchased another 170 shares at the same price.[4]

Although Garner at one time had offered one percent of STI-Kansas for $40,000, he now determined, as reflected in a series of memos dated October 2, 1978, to distribute STI-Kansas stock to certain employees of the company in exchange for one dollar per share and an

[4] The record is unclear whether Garner purchased more than 670 shares of STI-Kansas. The plaintiffs at one point state that Garner owned 840 shares before he distributed them as indicated below. This amount appears consistent with Garner's share at closing of stock in Tiger International, NACC's parent corporation, which was 67%.

employment commitment.[5] These transactions were completed on November 17, 1978, after the October 21 meeting but before closing the sale to NACC.

The parties' versions of what happened at the October 21 meeting differ substantially. Grogan and Henson testified that Garner represented to the shareholders that the 2.3 million dollar offer from NACC included the purchase of all STI facilities, including STI-Kansas.[6]

[5] Garner distributed the shares of STI-Kansas stock as follows:

Tom Garner – 85 shares
John Buffalo – 80 shares
Frank Garner, III – 60 shares
Marge Garner – 25 shares
Pacey Wohlner – 25 shares
Gilbert Liebig – 25 shares
Russell DeBerg – 10 shares
Richard Jardine – 10 shares
Wayne Leigh – 10 shares

[6] Garner distributed the following proposal:

SURFACE TRANSPORTATION INTERNATIONAL, INC. has received an offer from North American Car Corporation to purchase 100% of the outstanding stock of STI. Therefore, the vote of the Stockholders must be unanimous in favor of the stock purchase if we are to proceed further with negotiations.

Anything less than 100% of the stockholders voting affirmatively will immediately stop further negotiations with regard to the sale of STI and its subsidiaries to North American Car Corporation. Each of you are admonished to fully understand what the offer would mean to you personally as a stockholder

(Continued on following page)

NACC's letter of intent which, according to Grogan and Henson, Garner never distributed, revealed that NACC offered to pay separately for STI-Kansas by a stock

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(Continued from previous page)

of STI before making your decision to sell or not to sell.

The subsidiaries to be included in the sale are:

The Kansas City Car Shops (Two Shops, both Leased);
The Ferriday Louisiana Shop;
The Toledo Ohio Shop (Leased);
The Superior, Wisconsin Shop;
The South Dakota Facility – 10 year Management Contract;
Assets and outstanding stock of S.T.I. Special Services;
Assets and outstanding stock of Air and Surface Transportation International;
Rail Transportation Specialists – 5 year Management Contract;
S.T.I.X. Car Leasing (an inactive corporation)
Assets of Wheel Shop (Not funded at this time)
[emphasis added]

I understand the offer STI and the above-listed subsidiaries is $300,000 cash at closing and $2 million in North American notes or Tiger International stock, or a combination of both notes and stock. The cash to be distributed equally at closing based upon percentage of ownership. (See attached Example).

Stock or notes to be paid over a 10-year period at 8% interest, payable in 10 equal payments, plus interest, with first payment to be July of 1979. (See attached Example).

(Continued on following page)

exchange and extended an employment offer to Garner. Ultimately, NACC swapped shares of its parent corporation, Tiger International, valued at over 2.5 million dollars, for shares of STI-Kansas. Grogan and Henson claim that they did not learn of the separate consideration tendered for STI-Kansas until 1983. Had they known of the full transaction, they claim, they would not have agreed to sell their stock to NACC.

Garner, on the other hand, presented evidence that he disclosed at the October 21 meeting that he was the sole shareholder in STI-Kansas and that he distributed NACC's letter of intent. He also testified that he offered both plaintiffs the opportunity to become employees of STI-Kansas, but both failed to pursue the offer. Garner and John Buffalo further testified that Grogan received and reviewed the sales agreement before the closing on December 28 and 29, 1978. Grogan denied this. Garner and others also testified that all STI shareholders received a memorandum dated December 4, 1978, which set out the separate consideration for STI-Kansas. The plaintiffs deny receiving this memo.

On December 28 and 29, 1978, NACC purchased both corporations. Grogan and Henson received approximately $230,000 in cash and notes for their STI-Missouri stock. Besides cash and notes, Garner received for his

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(Continued from previous page)

I vote YES to accept the North American offer.

I vote NO to the offer of North American.

BY _____

Dated: October 21, 1978.

STI-Kansas shares Tiger International stock worth $1,700,460 and an employment contract with NACC. Tom Garner and Jim Buffalo, the other two STI-Missouri shareholders also holding stock in STI-Kansas, received Tiger International stock worth $215,730 and $203,040 respectively. The remaining seven STI-Kansas shareholders received Tiger International stock valued at $418,680. The total value of exchanged Tiger International stock was $2,537,910.

Discussion

Grogan and Henson claim they were not advised before, during, or after the October 21 meeting (1) that the wheel shop had been incorporated in September, 1978; (2) that STI-Kansas stock was sold for one dollar per share and employment commitments; (3) that those purchasing STI-Kansas stock from Garner were handpicked employees and relatives; and (4) that NACC paid a separate consideration, by way of Tiger International stock worth over 2.5 million dollars, for STI-Kansas. They allege that Garner misrepresented to them that the proposal of sale included the full consideration for both STI-Missouri and STI-Kansas. They urge that they were at all times led to believe that STI-Kansas was a division of STI-Missouri and that their ten percent interest in STI-Missouri properly included a proportionate interest in the assets of STI-Kansas. They therefore argue that they were entitled to ten percent of the value of the Tiger International stock, based on their ten percent ownership of STI-Missouri. Grogan and Henson claim they were individually defrauded when Garner misrepresented the terms of NACC's offer, and that by his actions, Garner breached a

fiduciary duty owed them and violated § 10(b) of the Securities Exchange Act of 1934.

Garner appeals, citing numerous errors that we will attempt to summarize: (1) the plaintiffs had no standing to sue because any injury sustained was to the corporation, requiring a derivative action; (2) the plaintiffs failed to prove sufficient evidence to sustain their claims for liability and damages; (3) the trial court committed various errors in its jury instructions; (4) the trial court erred in refusing to allow certain expert testimony; (5) the trial court erred in granting a post-verdict award of prejudgment interest on the § 10(b) claim; and (6) the trial court erred in not requiring the plaintiffs to elect among remedies.

Standing – Derivative Suit

We turn initially to the question of whether the suit should have been brought as a derivative action. The parties agree that Missouri law controls the issue. Whether a suit is properly brought as an individual action turns on whether the plaintiff has suffered an injury distinct from one incurred by the corporation. As one commentator has observed, "[i]f the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or *on a fraud affecting him directly*, it is an individual action." 12B Fletcher Cyclopedia Corporations § 5911 (Perm. Ed. 1984) (emphasis added); *see also Gieselmann v. Stegeman*, 443 S.W.2d 127 (Mo. 1969). In such a case, an individual stockholder may sue to redress direct

injury to himself, even if the same violation also injured the corporation. 12B Fletcher *supra*.

In *Dawson v. Dawson*, 645 S.W.2d 120 (Mo. App. 1982), a shareholder in the corporation sued individually and derivatively for an injunction and an accounting regarding an alleged illegal stock transfer from a director to another stockholder. The plaintiff claimed standing based upon his characterization of the director owing a fiduciary duty to each shareholder. While agreeing that a director is in a fiduciary relationship with shareholders as a whole, the court determined that "[c]orporate shareholders cannot in their own right and for their own personal use and benefit maintain an action for the recovery of corporate funds or property improperly diverted or appropriated by the corporation's officers and directors." 645 S.W.2d at 125. The court noted that "[w]here a complaint relates to the direct injury of the plaintiff, however, a derivative action may not be necessary." *Id.* Because the plaintiff failed to set forth facts showing how he had been individually harmed as a result of the improper stock transfer, the Missouri court concluded that he lacked standing to sue individually. *Id.*

We find *Dawson* inapposite to the facts in this case. Here, Grogan and Henson are not seeking redress for the misappropriation of corporate assets or property or for any wrong suffered by the corporation. Instead, they seek individual damages because Garner deceived them about the circumstances under which NACC acquired the STI enterprise. When this evidence is viewed in the light most favorable to the plaintiffs, as we are bound to do, there exists proof of misrepresentation by Garner that the

entire consideration to be paid was in exchange for STI-Missouri *and* and assets of the wheel shop. Grogan and Henson allege additional evidence of fraud in Garner's failure to inform them of NACC's offer to buy separately the assets of the wheel shop, which was represented by Garner to be unfunded at that time, for an additional 2.5 million dollars. Grogan and Henson do not allege that Garner withheld assets of STI-Missouri; all the corporate assets of STI-Missouri, including STI-Kansas, were transferred for consideration to NACC when it acquired 100% of the STI stock. Neither do they challenge the overall consideration tendered in the stock transfer.[7]

Moreover, in *Gieselmann v. Stegemen*, 443 S.W.2d 127 (Mo. 1969), the Missouri Supreme Court held that in an action based upon a tort where an injury is done directly to a shareholder, the shareholder may bring suit on an individual basis and need not resort to a derivative action. *Gieselmann* involved six stockholders who brought

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[7] Had the plaintiffs challenged only the propriety of the pre-closing sale of STI-Kansas shares to certain employees of the corporation, then *Dawson* possibly would have been controlling because the plaintiffs would be challenging the sufficiency of consideration paid for STI-Kansas stock. Garner offered the stock to certain employees for one dollar per share plus an employment commitment. A few months earlier, before the NACC offer, Garner had offered the stock for $40,000 for one percent of the company. However, the plaintiffs are not asserting a preemptive right to buy STI-Kansas stock; they are claiming that they were defrauded by Garner's representation that the consideration paid by NACC was in exchange for all the assets of the STI enterprise, including the wheel shop. The thrust of Garner's misrepresentation goes to the value of the plaintiffs' individual interests, or ten percent of STI-Missouri stock.

an individual suit against several other shareholders and the corporation. The plaintiffs claimed that they had been fraudulently deprived of controlling stock in the corporation and of positions on the board and as officers. As the court noted, not every allegation in the petition was appropriate for an individual action. However, "[t]he *gravamen* of the pleading * * * [was] injury to the plaintiffs *as individuals*," 443 S.W.2d at 131 (emphasis in original), and the court allowed the individual suit to stand.[8]

There should be little question that the plaintiffs have standing to sue for their personal harm. The plaintiffs were asked to sell their stock for a stated price as represented in Garner's proposal of sale. Although the proposal concerned the sale of STI-Missouri, Garner made it clear that the shareholders should "fully understand what the offer would mean to you personally before making your decision to sell or not to sell." The shareholders were told that the consideration set forth was the

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[8] Grogan and Henson also rely on a recent Missouri Court of Appeals decision to bolster their standing argument. In *Forinash v. Daugherty*, 697 S.W.2d 294 (Mo. App. 1985), shareholders of a closely held bank corporation brought suit alleging that officers and directors secretly sold controlling stock interests at the expense and to the exclusion of minority shareholders. The primary issue in the case was whether Missouri holds controlling shareholders in a closely held corporation to a fiduciary duty to minority shareholders, and if so, whether that duty is heightened because of the nature of the corporation.

Garner argues, and we agree, that *Forinash* does not deal with the issue of when a derivative suit is required. In fact, the court never mentions whether the suit was brought as a derivative or individual action.

full price to be paid for the STI enterprise, including the "Assets of the wheel shop (Not funded at this time)." This was an overall representation that NACC was paying the consideration set forth for *all* of the assets, including the whee! shop, and that plaintiffs' shares were to be ten percent of the entire consideration paid. Grogan and Henson had every right to believe that their ten percent interest included the assets of STI-Kansas as well as those of STI-Missouri.

Grogan and Henson testified and we must assume the jury found that on October 21, 1978, they did not know that Garner had incorporated the wheel shop and, with a few hundred dollars, purchased shares in it soon to be worth over two million dollars. Grogan and Henson also did not know that Garner had selectively distributed part of these shares to his relatives and certain employees. At the time of the NACC offer to buy the shares of stock of STI-Missouri, as communicated to the shareholders by Garner, Grogan and Henson were led to believe that STI-Missouri still owned all the assets of STI-Kansas and relied on that understanding when they approved the sale of their STI-Missouri shares of stock. Such reliance was reasonable considering that Garner represented in his May, 1978, letter that STI-Missouri would "retain 20-30% of STI-Kansas" after STI-Missouri shareholders purchased percentages of STI-Kansas. Such reliance is also reasonable in light of the proposal of sale that listed the wheel shop as one of the "subsidiaries" of STI-Missouri.

No doubt, the plaintiffs could have brought a derivative action had they known all the facts at the October 21 meeting. However, this action does not turn solely on

Garner's misappropriation of wheel shop assets but on the direct fraud committed by him when he misrepresented the terms of NACC's offer. In short, Garner's fraudulent actions prevented the plaintiffs from realizing the true value of their shares and maximizing that value in the sale to NACC. Grogan and Henson were directly harmed by Garner's misrepresentations, and they properly brought suit as individuals so harmed.[9]

Sufficiency of the Evidence

Garner next argues that Grogan and Henson failed to produce sufficient evidence to sustain the jury's verdict. Although the record contains conflicting versions of the various transactions, the jury obviously believed the plaintiffs' version of what happened. This court cannot disturb a jury verdict if there is substantial evidence, viewed in the light most favorable to the plaintiffs, to support the verdict. *United States v. Lewis*, 759 F.2d 1316, 1352 (8th Cir.), *cert. denied*, 106 S. Ct. 406 (1985).

As part of his argument, Garner contends that there was insufficient evidence to establish causation for the alleged damages because neither plaintiff was an

[9] On effect of a successful attack on the plaintiffs' individual suit would have been to destroy complete diversity jurisdiction. However, had this occurred, the plaintiffs point out that the § 10(b) claim establishes federal question jurisdiction so that the counts of common law fraud and breach of fiduciary duty would still be within the district court's pendent jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

STI-Kansas shareholder. As we have already discussed, Garner miscomprehends the essence of the plaintiffs' claims. Grogan and Henson acknowledge that they were not STI-Kansas shareholders. They do not claim a right to be STI-Kansas shareholders, nor do they claim a preemptive right to buy STI-Kansas stock at one dollar per share. Their allegations are grounded in Garner's fraudulent misrepresentation of the terms of the sale to NACC. Because of these misrepresentations, neither plaintiff was aware of the true value of his STI-Missouri stock. *See Myzel v. Fields*, 386 F.2d 718, 733 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). This is especially significant not only in terms of dollar value, but also of bargaining power. NACC's offer was conditioned on 100% shareholder approval of the sale. Garner's fiduciary duties as a director and officer of STI-Missouri included the duty to disclose fully the terms of a sale affecting the plaintiffs' interests in STI-Missouri. We find substantial evidence, as did the jury, to support proof of fraud committed by Garner against the plaintiffs.

Jury Instructions

Garner contends that the trial court committed various errors in its jury instructions. The trial court has broad discretion to instruct the jury in the form and language it considers a fair and adequate presentation of substantive law. *Garnes v. Gulf & Western Mfg. Co.*, 789 F.2d 637, 642 (8th Cir. 1986). This court reviews jury instructions to determine whether, taken as a whole, they are confusing or misleading in presenting the principles of law applicable to the case. *Des Moines Bd. of Waterworks*

v. Alvord, Burdick & Howson, 706 F.2d 820, 823 (8th Cir. 1983).

We believe that the instructions as a whole fairly and adequately presented the substantive law and were neither misleading nor confusing so as to prejudice the defendant. Garner challenges instructions 6, 7, 12, 23, 24, and 29, not because they misstated Missouri law, but because they resulted in "redundant overkill" when the court separately instructed on misrepresentation and nondisclosure. To simultaneously instruct the jury on both, however, would have required the court to discuss dissimilar legal elements in one instruction. We find the court's separate instructions more in keeping with the objective of facilitating the jury's understanding of the substantive law.

Garner also challenges instructions 8, 9, 25, and 26, which relate to Garner's breach of fiduciary duty. The instructions described Garner's fiduciary duties to the plaintiffs as well as to the corporation. As we have already explained, Garner had a fiduciary duty to disclose fully to the plaintiffs the terms of NACC's offer, including the provisions relating to the wheel shop. The jury was properly instructed that it could find Garner guilty of breach of fiduciary duty if he failed to disclose the complete terms of the offer.[10]

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[10] Although Garner objected at trial to the fiduciary duty instructions, he did not offer an alternative instruction. A party may not complain on appeal that an instruction is ambiguous if he fails to offer a clearer instruction at trial. *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 783 (8th Cir. 1984).

We also find the district court was within its discretion when it used the appropriate legal terms to differentiate the various theories in the case. Much of Garner's objection to the instructions focuses on their form. He claims that they were not set out under the systemized approach mandated by the Missouri Approved Jury Instructions. We have noted on other occasions, however, that while instructions pertaining to claims for relief under diversity jurisdiction must fully and properly instruct on all the elements of controlling state law, the form of state-approved jury instructions is not binding on the district court. *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 530 (8th Cir. 1984) (Missouri jury instructions).[11]

Expert Testimony

Garner next contends that the district court erred when it refused to allow the expert testimony of Richard Sewell, an accountant. Garner claims that Sewell's testimony regarding the tax consequences in 1978 in selling both STI-Missouri and STI-Kansas in one transaction would have critically undermined the plaintiffs' case. Sewell was allowed to testify about various STI financial statements, but plaintiffs' counsel objected when Sewell

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[11] Garner also claims error in the district court's failure to instruct on certain affirmative defenses. However, he has not preserved his right to appeal because he failed to timely object at trial. A party who tenders instructions but fails to object to the court's failure to give the proffered instructions waives the right to complain on appeal. *DeFranco v. Valley Forge Ins. Co.*, 754 F.2d 293, 296 (8th Cir. 1985).

was asked about the tax ramifications of the sale of a business entity similar to the STI enterprise.[12]

The court excluded Sewell's testimony because Garner had failed to reveal in answers to interrogatories that he planned to use this expert testimony. Plaintiffs' Interrogatory No. 11 inquired, pursuant to Fed. R. Civ. P. 26(b)(4)(A)(i), as to the identity of the defendant's expert witnesses and the subject of their testimony. Garner's answer to this interrogatory did not indicate that the tax consequences of the transaction was a subject area to be testified to by an expert. After examining the interrogatory answer and questioning counsel about it, the district court excluded Sewell's testimony regarding potential tax ramifications of the sale. Generally, an appellate court will reverse the district court's decision to exclude evidence only when there has been an abuse of discretion. *See SCNO Barge Lines, Inc. v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192 (8th Cir. 1984). The trial court did not abuse its discretion when it refused to admit this evidence.

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[12] Counsel for Garner asked Sewell the following question:

> Q. And December of 1978, if someone would have sold the same business entities for a total of $2 million in cash, or $2.5 million in cash and $2.5 million worth of valued stock, of stock that supposedly had that value, would that whole transaction have been treated as a long-term capital gain or as some other transaction which would put it in a different tax rate? I don't want to know the rate. I just want to know the theory behind it.

Damages, Prejudgment Interest, and Election of Remedies

Garner's final two claims of error relate to the damages awarded. Garner argues that the trial court erred in granting the plaintiffs' post-verdict motion for prejudgment interest on the § 10(b) claim and in not requiring the plaintiffs to elect the count under which they recovered their judgment. As we stated earlier, the jury originally awarded both Henson and Grogan $249,000 on each of the three counts, plus $24,900 punitive damages on the fraud count. The court adjusted the award so that each plaintiff received only one award of $249,000 plus punitive damages and prejudgment interest.

Punitive damages are not permitted in a § 10(b) claim. *Nye v. Blyth Eastman & Dillon Co.*, 588 F.2d 1189, 1200 (8th Cir. 1978). At one time, federal courts struggled with the question of whether § 28(a), 15 U.S.C. § 78bb, of the Securities Exchange Act of 1934 prohibits an award of punitive damages in a pendent state claim, even if state law permits such damages.[13] The courts now appear to uphold uniformly punitive damages awarded under these circumstances. *See, e.g., Nye v. Blyth Eastman & Dillon, supra* at 1200; *Ryan v. Foster & Marshall, Inc.*, 556

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[13] Section 28(a) provides in part:

> The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

F.2d 460, 464 (9th Cir. 1977); *Falks v. Koegel*, 504 F.2d 702, 706-07 (2d Cir. 1974); *Coffee v. Permian Corp.*, 474 F.2d 1040, 1044 (5th Cir.), *cert. denied*, 412 U.S. 920 (1973); *Young v. Taylor*, 466 F.2d 1329, 1337 (10th Cir. 1972).

While the case law, including that of this circuit, clearly allows for recovery of punitive damages in pendent state claims, we have not before been faced with whether punitive damages on a common law claim and prejudgment interest on a federal claim are both recoverable when the plaintiff has prevailed on both. Unlike punitive damages, prejudgment interest on a § 10(b) claim is permitted and is within the sound discretion of the trial court.[14] *See Blau v. Lehman*, 368 U.S. 403, 414 (1963); *Woods v. Barnett Bank*, 765 F.2d 1004, 1014 (11th Cir. 1985).[15]

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[14] Garner also argues that prejudgment interest was improper because it was not pled and submitted to the jury. While there is analogous case law to this effect, *see Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 82 (1st Cir.1984) (involving 28 U.S.C. § 1875, the Grand Jury Act); *Furtado v. Bishop*, 604 F.2d 80, 98 (1st Cir. 1979) (involving 42 U.S.C. § 1983), *cert. denied*, 444 U.S. 1035 (1980), it is clearly not the rule in this circuit in actions arising under the Securities Exchange Act of 1934. *See Western Auto Supply Co. v. Gamble-Skogmo Co.*, 348 F.2d 736, 744 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966). An award of prejudgment interest in a § 10(b) case is within the sound discretion of the trial court and will be overturned only if it is so unfair or so inequitable as to require it. *Riseman v. Orian Research, Inc.*, 749 F.2d 915, 921 (1st Cir. 1984). The trial court did not abuse its discretion when it awarded prejudgment interest on the § 10(b) claim.

[15] Grogan and Henson did not cross-appeal the trial court's limiting the award of prejudgment interest to the

(Continued on following page)

Garner's argument that the plaintiffs may not recover duplicitous damages is well taken, but we do not believe this requires an "election of remedies" in its traditional sense. Election of remedies is, in the words of one commentator, "the legal version of the idea that a plaintiff may not have his cake and eat it too." D. Dobbs, *Remedies* § 1.5 at 14 (1973). A plaintiff must elect among remedies when he has available inconsistent remedies for the redress of a single right. A plaintiff, for example, may sue for damages for the conversion of property or he may bring a replevin action to recover the property itself. *See Myzel v. Fields*, *supra* at 740-41. The doctrine and the cases interpreting it often "do no more than prevent double recovery," although the principle is not always clearly expressed or properly used. *Dobbs*, *supra*. However, the doctrine is remedial, and neither it nor the federal rules of pleading require an election of substantive theories. *Dobbs*, *supra* at 16; *see also* Fed. R. Civ. P. 8(a).

Grogan and Henson are not seeking inconsistent remedies requiring an election in the typical sense. They

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(Continued from previous page)

§ 10(b) count. Prejudgment interest in a diversity action is determined by the law of the state where the action arose. *California & Hawaiian Sugar Co. v. Kansas City Terminal Warehouse*, 788 F.2d 1331, 1333 (8th Cir. 1986). In Missouri prejudgment interest is generally appropriate when the amount due is liquidated or, although not strictly liquidated, is readily ascertainable by reference to recognized standards. *See St. Joseph Light & Power Co. v. Zurick Ins. Co.*, 698 F.2d 1351, 1355 (8th Cir. 1983) (citing *Denton Constr. Co. v. Missouri State Highway Comm'n*, 454 S.W.2d 44, 59-60 (Mo. 1970). Because the issue was not raised on appeal, we make no judgment as to the propriety of prejudgment interest on the common law counts.

did not ask for a rescission of the contract of sale to NACC along with money damages. *Cf. Randall v. Loftsgaarden*, 106 S. Ct. 3143, 3153 (1986) (plaintiff in § 10(b) case in some circumstances may choose between rescission and actual damages). They sought and were awarded money damages for the amount they considered their fair share of the overall consideration paid by NACC for the assets of STI-Missouri as represented by Garner.[16] They were also awarded punitive damages on the fraud count and prejudgment interest on the § 10(b) count.[17]

When a federal securities claim overlaps with a pendent state law claim, the plaintiff is entitled to the maximum amount recoverable under any claim. Jacobs, *The Measure of Damages in Rule 10b-5 Cases*, 65 Geo. L.J. 1093, 1166 (1977). This does not require an election of remedies. Instead, Grogan and Henson are each entitled to the greatest amount recoverable under any single theory pled, with actual damages plus prejudgment interest representing one single amount and actual damages plus punitive damages representing the other single amount. *Randall v. Loftsgaarden*, 106 S. Ct. at 3156 (Blackmun, J., concurring) (parties who prevailed on § 10(b) claim and on § 12(2) claim entitled to select the damage amount more favorable to them); *Aboussie v. Aboussie*, 441 F.2d

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[16] Each plaintiff was awarded $249,000 in actual damages, or approximately 10% of the 2.5 million dollars paid for STI-Kansas.

[17] Each plaintiff was awarded $24,900 in punitive damages, or 10% of the actual damages. The court awarded prejudgment interest at nine percent per annum from April 17, 1979, to the date of judgment.

150, 157 (5th Cir. 1971) (jury award under common law count upheld; new trial ordered to determine damages under 10b-5, with caveat that if federal damages are less than common law damages, the federal damages are extinguished); *cf. McDonald v. Johnson & Johnson*, 776 F.2d 767, 770 (8th Cir. 1985) (fraud and contract claims constitute separate causes of action because defendant's illegal acts occurred at separate and distinct times; therefore, plaintiffs' collection of contract judgment does not preclude litigation of fraud claim). We therefore conclude that Grogan and Henson may receive one award of damages under either the § 10(b) claim or the common law claim, whichever is the greatest, and upon satisfaction of the judgment, the lesser damages are deemed extinguished.

The judgment in favor of Grogan and Henson is affirmed as to liability; the judgment for damages is modified in accord with the principles set forth herein.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain — 314-425-5600
Clerk — FTS: 279-5600

December 8, 1986

Mr. Arthur Stoup
950 Home Savings Bldg.
1006 Grand Ave.
Kansas City, MO 64106

Messrs.
Thomas M. Franklin and
Michael J. Gallagher
127 W. 10th St., Ste. 1015
Kansas City, MO 64105

Re: 85-2098WM Coy R. Grogan, et al. v. Frank J. Garner, Jr.

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 15 and 16. Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing or motions to extend the time for filing rehearing requests are not afforded any grace period for mailing and are subject to being denied if not timely received. Please review Eighth Circuit Rule 16(d) if an en banc request is contemplated.

You are also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j). Itemized and verified bills of costs are to be filed with this office with proof of service **within 14 days from this date.** Counsel for the prevailing party should **promptly** forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. Failure to submit an itemized bill of costs will result in waiver of costs. Untimely itemized bills of costs will not

be processed without a special order of the Court. Objections to requested bills of costs must also be submitted on a timely basis-within 10 days of the bill of costs.

Sincerely,

ROBERT ST. VRAIN, CLERK

BY: /s/ Jackie Peters
Jackie Peters
Deputy Clerk

RSV/jp
Enclosure
cc: Robert F. Connor, Clerk, 84-516-CV-W-5

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

Case No. 85-03755-2

Adv. No. 86-0183-2

(Caption Omitted In Printing)

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

(Filed Mar. 20, 1987)

Defendant has filed his Motion to Alter or Amend Judgment. The Court has considered and reconsidered the basic semantic question, i.e., does the term 'clear and convincing mean something more than 'prepondernace [sic] of' or 'sufficiency of' when modifying the word 'evidence"?' Right or wrong, this Court has concluded that in the context of Section 523, it does not.

Counsel for debtor in effect argue that there are three standards of evidence. First, "beyond a reasonable doubt", the sine qua non of the criminal finding. Second, "preponderance of the evidence" which sometimes has even been called "the weight of the evidence", the usual standard for civil finding. Third, "clear and convincing" which would apparently reside somewhere between the two standards set out above. Unfortunately, this Court can find no clear and convincing reason to conclude that this evidentiary halfway house is real rather than illusory. Instead it seems to be an endless circle merely using different words for the same standard.

The Court, therefore, OVERRULES defendant's Motion on the basis of a conclusion of law that "clear and convincing evidence" is not a higher standard of evidence than "preponderance of evidence".

SO ORDERED this 20 day of March, 1987.

/s/ Frank W. Koger
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

Case No. 85-03755-2

Adv. No. 86-0183-2

(Caption Omitted In Printing)

AMENDED MEMORANDUM OPINION AND ORDER

(Filed Jun 17, 1987)

This adversary action by two creditors seeking to avoid discharge of debtor on their respective claims came to an abrupt halt at the conclusion of creditors' case when debtor elected to present no evidence and stood on his oral Motion for Dismissal made when the plaintiff/creditors rested. Creditors had each obtained a jury verdict against debtor in the United States District Court for the Western District of Missouri, before the petition for reorganization was filed. Debtor had appealed the resulting judgments to the Eighth Circuit Court of Appeals. That latter tribunal affirmed the judgments post petition and this § 523 Adversary proceeding, having been timely filed, proceeded to trial. Creditors did not offer the transcript of the proceedings in the District Court case. Instead, they introduced only four exhibits and rested.

Those four exhibits were:

Exhibit 1: A copy of creditors' first amended complaint.

Exhibit 2: A copy of debtor's addendum to the brief of debtor to the Eighth Circuit, containing instructions to the jury and the Verdict Director as well as the jury verdict and the District Court judgment.

Exhibit 3: The opinion of the Eighth Circuit Court of Appeals.

Exhibit 4: Letter from Eighth Circuit Court of Appeals transmitting the opinion.

The Court, therefore, is required to determine from the exhibits if creditors have made a case and established all elements necessary under § 523.

The original District Court complaint is drawn in five counts. Count I alleged common law fraud, potentially cognizable under § 523(a)(2). Count II alleged a breach of fiduciary duty, potentially cognizable under § 523(a)(4). Count III alleged a use of interestate [sic] instrumentality to make alleged misrepresentations. This Court [sic] adds nothing in a bankruptcy proceeding under § 523. Count IV alleged a RICO violation which again, adds nothing to a bankruptcy proceeding under § 523. For the reasons stated hereafter, the Court will consider only Count I or the common law fraud Count.

The jury instructions in Count I required the jury to find in Instruction Number 6 and Instruction Number 23 (respectively to each creditor):

First: That debtor made a representation to each creditor.

Second: That the representation was false.

Third: That the defendant knew his representation was false.

Fourth: That the representation was material in causing each creditor's decision.

Fifth: That each creditor relied on the debtor's representation.

Sixth: That as a direct result of such representation each creditor was damaged.

Seventh: That each creditor did not discover the alleged fraud until a later date.

The jury verdict was unanimous in favor of each creditor and against the debtor on Count I, as well as two other counts. After the filing of post trial motions, the District Court ruled:

> "Here there clearly was sufficient evidence to support the jury's conclusion that defendant . . . intentionally defrauded plaintiffs."

The United States Court of Appeals for the Eighth Circuit unaimously [sic] affirmed and held that there was sufficient evidence to support the verdict.

Since 1970, the bankruptcy courts have been the sole arbiter of what debts are not discharged by a bankruptcy proceeding. *Brown v. Felsen* 442 U.S. 127, 99 S.Ct. 2205 (1979) tells us that: " . . . are the type of questions that Congress intended the bankruptcy court would resolve," (1.c. 2112). Although that opinion dealt only with a state court judgment, there is no reason to suspect that the same rule would not apply to judgments rendered in Federal Courts also. The question then becomes did the judgment in the District Court constitute so similar a finding of fraud in that action as to provide a basis for the bankruptcy court to determine that § 523 fraud was committed thereby rendering the judgment non dischargeable, or is the debtor collaterally estopped from relitigating those issues of fact determined by a prior finding thereon. Again, *Brown v. Felsen Id.* footnote 10,

page 2213, supplies the answer. "If in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of Section 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court." Thus, the Court is led to the conclusion that the elements to be provided under § 523(a)(2) must be compared with the elements decided by the unanimous jury in the District Court case, and, if identical, as to content and standard, creditors have borne their burden.

Under Section 523(a)(2) those elements are:

(1) Utterance or issuance of a representation,

(2) Proof of the falsity of the representation,

(3) Proof of knowledge on the part of the maker of that falsity,

(4) Intent to mislead or deceive the alleged victim by the maker,

(5) Reliance on the representation of the victim,

(6) Proof that damage occurred to the alleged victim.

(See *Sweet v. Ritter Finance Company,* 263 F.Supp. 540 (W.D. Va. 1967).

By comparing these standards with instructions Number 6 and Number 23, it appears to the Court that every element required to be found by the Court in the dischargeability hearing was already found by the jury in the District Court verdict. Further those findings received the judicial seal of approval from the District Court in its

Order of August 7, 1986, when it stated: "Here, there clearly was sufficient evidence to support the jury's conclusion that defendant violated his fiduciary duty and intentionally defrauded plaintiffs." The Court of Appeals, Eighth Circuit, stated: "We find substantial evidence, as did the jury, to support proof of fraud committed by Garner against the plaintiffs."

Therefore although this Court believes and holds that the Bankruptcy Court is the sole arbiter of § 523 dischargeability vel non, nevertheless where identical factual issues have been fully litigated and properly decided using identical standards by courts of appropriate jurisdiction, collateral estoppel bars relitigation of those issues in this Court. This leads to the final question to be determined by this Court, i.e., were identical standards used?

In defendant's brief, the point is made that the standard in the District Court trial was "preponderance of the evidence" while the standard should be "clear and convincing" and that the two are totally dissimilar. If defendant's point is well taken, then obviously collateral estoppel does not come into play and there is insufficient evidence before the Court to determine dischargeability. The Honorable Dennis J. Stewart, Chief Bankruptcy Judge of this District, had occasion to explore this identical question in a footnote to his opinion in *Matter of Curl*, 49 B.R. 302 (Bkr. W.D. Mo. 1985), see footnote 6. This Court, although not bound by that ruling, frankly considers it not only the best exposition of how the apparent divergence arose, but strongly recommends that any counsel engaged in § 523 litigation regard that opinion (and the

footnotes) as required reading for a thorough understanding of the elements of proof and the applicability of evidentiary standards. Accordingly, this Court concludes that there is no real distinction between "preponderance of the evidence" and "clear and convincing" as regards § 523 litigation.

Inexorably then, the Court concludes that through collateral estoppel, creditors sustained the burden of proof and through their exhibits sustained the burden as to all elements of dischargeability. The judgment rendered on common law fraud which was pled in Count I of plaintiff's original complaint in Federal District Court is, therefore, ruled to be non-dischargeable. No ruling is necessary on any other Count, even Count II, the alleged fiduciary breach, inasmuch as only one recovery may be had by creditors. Although this result is in favor of creditors, the Court must point out that it believes better practive [sic] would be to intr- duce the transcript in such a proceeding, and that creditors in similar proceedings run a substantial risk of not presenting the Court with sufficient evidence upon which to base a ruling when they rely upon collateral estoppel alone.

SO ORDERED this 17 day of June, 1987.

/s/ Frank W. Koger
BANKRUPTCY JUDGE

JUDGMENT IN A CIVIL CASE

(Filed Feb 29, 1988)

United States District Court	District WESTERN DISTRICT OF MISSOURI
Case Title John R. Henson and Coy R. Grogan V. Frank J. Garner, Jr.	Docket Number 87-0434-CV-W-1 Name of Judge or Magistrate Judge Dean Whipple

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the court therefore adopts the findings of the Bankruptcy Court and incorporates them in these findings by reference, and affirms the decision of the Bankruptcy Court.

Entered on Mar 1 1988

Clerk	Date
Robert F. Connor	Feb. 29, 1988

(By) Deputy Clerk
/s/ Leonora S. Miller

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 87-0434-CV-W-1

(Caption Omitted In Printing)

ORDER

(Filed May 19, 1988)

Before the court is appellant's motion to alter or amend judgment, dated February 29, 1988, filed March 11, 1988. Appellees filed suggestions in opposition on April 5, 1988.

Appellant requests this court to alter or amend its February 29, 1988 judgment upon the ground that there is an actual distinction between the standard of proof required in an 11 U.S.C. § 523(a)(2)(a) action and a common law fraud action. Thus, appellant argues this court should enter judgment in favor of appellant. In their suggestions in opposition, appellees point out that appellant has raised no new legal arguments in his latest brief. Further, appellant does not dispute that the bankruptcy dischargeability adversary proceeding and the common law fraud case involved identical factual issues. Appellant merely continues to assert that the district court judgment was not based upon the identical burden of proof as that required in § 523 litigation.

Appellant again asserts that the recent Eighth Circuit decision in *In re Van Horne*, 823 F.2d 1285 (8th Cir. 1987) somehow sheds new light on the burden of proof required in § 573[sic](a)(2)(A) dischargeability actions. This argument was addressed in the court's February 29, 1988 order. Accordingly, appellant's motion to alter or

amend this court's judgment dated February 29, 1988 is denied.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATED: MAY 19TH, 1988.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 87-434-CV-W-1

(Caption Omitted In Printing)

NOTICE OF APPEAL

(Filed June 17, 1988)

FRANK J. GARNER, JR., the Debtor/Defendant, appearing in his own behalf without legal counsel, appeals to the Eighth Circuit Court, from the Order of the District Court denying Defendant's Dischargability [sic] of Judgment entered on the 29th day of February, 1988; and, Order denying Defendant's Motion to Alter or Amend Judgment of the District Court entered in this proceeding on the 19th day of May, 1988.

The parties to the Orders appealed from and the names and addresses of their respective attorneys are as follows:

Frank J. Garner, Jr., Defendant	John R. Henson and Coy R. Grogan, Plaintiffs
2510 Grand Avenue Unit 1901 Kansas City, MO 64108 DEBTOR/DEFENDANT	Michael J. Gallagher 4435 Main, Suite 840 Kansas City, MO 64105 ATTORNEY FOR PLAINTIFFS

DATED: June 17, 1988

(Signature Block Omitted In Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

No. 84-0516-CV-W-5
Kansas City, Missouri
April 23, 1985

(Caption Omitted In Printing)

PARTIAL TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE SCOTT O. WRIGHT
UNITED STATES DISTRICT JUDGE

(Filed July 14, 1989)

(p. 2)

* * *

THE COURT: All right. Now, ladies and gentlemen of the jury, I'll read you these instructions. This instruction and other instructions are for your guidance in your deliberations when you retire to the jury room. They will directly concern the legal rights and duties of the parties, and how the law applies to the facts which you will be called upon to decide. The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. At the close of the evidence, the lawyers may make arguments on behalf of their clients. Neither what is said in opening statements or closing arguments is to be considered as proof of a fact. However, if a lawyer admits some fact, on behalf of his client, the other party is relieved of the responsibility of proving that fact. After the opening statements, the plaintiff will introduce evidence. After that, the defendant may introduce evidence and there may be rebuttal evidence after that. The evidence may include the testimony of witnesses who appear personally in court, the testimony of witnesses who may not appear personally, but whose testimony

may be read to you in exhibits, such as pictures, documents, and other objects. While the trial is in progress, I may be called upon to determine questions of law and to decide whether these matters may be considered by you under the law. No ruling or remark which I may make at any time during the (p. 3) trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from become mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you. After all the evidence has been presented and you've heard the closing arguments of the lawyers and received my instructions, you will retire to the jury room for your deliberations. At that time, it will be your duty to select a foreman, to decide the facts and to arrive at a verdict. Justice requires that you not make up your mind about the case until all the evidence had been seen and heard. You must not comment on or discuss what you may hear or learn in the trial until the case its concluded and you retire to the jury room for your deliberations. During the trial, you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise, some outside influence or comment might influence a juror to make up his or her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed. When you enter into your deliberations, you will be considering the testimony of witnesses, as well as (p. 4)

other evidence to which I've referred. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude, and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully, and the probability or improbability of the witness's statements. You may give the testimony of any witness such weight and value as you believe that testimony is entitled to receive. There'll be some matters which will be offered by the parties and to which objections will be made. If I overrule the objection, you may consider that matter when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded and must not be considered by you in your deliberation. Again in the trial, you must make your decision based on what you recall of the evidence. You'll not have a written transcript to consult, and the court reporter cannot read back lengthy testimony. You must pay close attention to the testimony as it is given. Finally, to insure fairness, you as jurors must obey the following rules. First, do not talk among yourselves about this case or about anyone involved with it until the end of the case when you go to the jury room to decide on your verdict. Second, do not talk to anyone else about this case or about anyone involved with it until the trial has ended and (p. 5) you have been discharged as jurors. Anyone else includes members of your family and friends. You may tell them that you're a juror in a federal civil case, but don't tell them anything else about it until after you've returned your verdict. Third, when you're outside the courtroom do not let anyone tell you anything

about the case or about anyone involved in it. If someone should try to talk to you about the case, please report it to me immediately. Fourth, you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case. You should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side, even if it's simply to pass the time of day, an unwarranted or unnecessary suspicion about your fairness may be aroused. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, please keep in mind that I've instructed them to avoid talking or visiting with you. Fifth, do not read any news stories or articles about the case or about anyone involved in it, or listen to any radio or television reports about the case or about anyone involved with it. In fact, until the trial's over, I'd suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at (p. 6) all. I do not know if there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories, set them aside to give you after the trial is over. I can assure you, however, that by the time you've head the evidence in this case you will know more about the matter than anyone will learn through the news media. Sixth, do not do any research and made any investigation about the case on your own. Seven, do not make up your mind during the trial about

what the verdict should be. Keep an open mind until after you've gone to the jury room to decide the case, and you and your fellow jurors have discussed the evidence. Now that I've given you my preliminary instructions, the remainder of the trial will proceed in the following manner. First, the plaintiff's attorney will make an opening statement, which is simply an outline to help you understand what the plaintiff expects to prove. Next, the defendant's attorney may, but does not have to, make an opening statement. The Plaintiff will then present his evidence and counsel of defendant may cross examine. Following the Government's case, the defendant may present evidence and the plaintiff may cross examine. After presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. Also, I (p. 7) shall instruct you further on the law. After that, you will retire to deliberate on your verdict.

(END OF REQUESTED PROCEEDINGS)

* * *

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE RECORD OF PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

/s/ Deanna J. Miller July 13, 1989
DEANNA J. MILLER

Instruction No. 1

As you remember, the Court gave you a general instruction before the presentation of any evidence in this

case. The Court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Given
(Filed May 1, 1985)

Instruction No. 2

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 3

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden of causing you to believe a proposition of fact is upon the party whose claim or defense depends upon that proposition. In determining whether or not you believe any such proposition,

you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 4

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for your self, but only after the impartial consideration of the evidence in the case with your fellow jurors. In the course of deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTION NUMBER 5

Instruction 5 through 21 and general instructions 1 through 4 apply to the claims of the plaintiff Grogan against the defendant Frank J. Garner, Jr. use Verdict A to return your verdict on these claims.

INSTRUCTION NUMBER 14

Section 1962(c) of RICO provides that it is unlawful for a person employed by or associated with an "enterprise" engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering.

INSTRUCTION NUMBER 15

Your verdict must be for the plaintiff Grogan on his claim for violation of civil RICO if you believe:

First: That the Wheel Shop was an "enterprise," as that term is defined in Instruction 18; and

Second: That defendant on at least two occasions committed acts of mail or wire fraud; and

Third: That such acts of mail or wire fraud were connected by some common scheme, plan, or motive; and

Fourth: That defendant committed or caused to be committed those two or more acts of mail or wire

fraud while conducting and participating, either directly or indirectly, in the conduct of the affairs of the Wheel Shop; and

Fifth: As a direct result of the defendant's conduct as submitted in this instruction, plaintiff Grogan sustained damages.

Unless you believe plaintiff is not entitled to recover by reason of Instruction Number 19.

INSTRUCTION NUMBER 16

Mail fraud, as referred to in Instruction No. 15, has five essential elements, which are:

First, the defendant made up a plan or scheme to obtain money or property by false statements or representations, and

Second, in furtherance of said plan or scheme, the defendant made certain false statements or representations and, at the time of making such false statements or representations, he knew that they were false, and

Third, that the false statements or representations related to something important to the plan or scheme, and

Fourth, that for the purpose of carrying out such plan or scheme, that the defendant used the mails; and

Fifth, that the defendant acted with the intention of obtaining money or property by false statements or representations.

INSTRUCTION NUMBER 17

Wire fraud, as referred to in Instruction 15, has five essential elements, which are:

First, the defendant made up a plan or scheme to obtain money or property by false statements or representations, and

Second, in furtherance of said plan or scheme, the defendant made certain false statements or representations and, at the time of making such false statements or representations, he knew that they were false, and

Third, That the false statements or representations related to something important to the plan or scheme, and

Fourth, that, for the purpose of carrying out such plan or scheme, the defendant placed an interstate telephone call, and

Fifth, that the defendant acted with the intention of obtaining money or property by false statements or representations.

INSTRUCTION NO. 18

The term "enterprise", as referred to in Instruction No. 15, is defined as any partnership, corporation, association, or other legal entity, or any group of individuals associated in fact although not a legal entity. An "enterprise" must exhibit three basic characteristics:

(1) it must have a common or shared purpose;

(2) it must have some continuity of structure and personnel; and

(3) it must have an ascertainable structure distinct from that inherent in the conduct of the two or more acts of mail or wire fraud you may find under Instruction Number 15.

INSTRUCTION NUMBER 19

Your verdict must be for the defendant on plaintiff Grogan's claim of violation of civil RICO if you believe plaintiff Grogan actually discovered, or, in the exercise of reasonable diligence, should have discovered the alleged acts in violation of RICO before May 7, 1982.

INSTRUCTION NUMBER 22

Instruction 22 through 38 and general instruction 1 through 4th apply to the claims of the plaintiff Henson against the defendant Frank J. Garner, Jr. use Verdict B to return your verdict on these claims.

INSTRUCTION NUMBER 31

Section 1962(c) of RICO provides that it is unlawful for a person employed by or associated with an "enterprise" engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering.

INSTRUCTION NUMBER 32

Your verdict must be for the plaintiff Henson on his claim for violation of civil RICO if you believe:

First: That the Wheel Shop was an "enterprise," as that term is defined in Instruction 35; and

Second: That defendant on at least two occasions committed acts of mail or wire fraud; and

Third: That such acts of mail or wire fraud were connected by some common scheme, plan, or motive; and

Fourth: That defendant committed or caused to be committed those two or more acts of mail or wire fraud while conducting and participating, either directly or indirectly, in the conduct of the affairs of the Wheel Shop; and

Fifth: As a direct result of the defendant's conduct as submitted in this instruction, plaintiff Henson sustained damages.

Unless you believe plaintiff is not entitled to recover by reason of Instruction Number 36.

INSTRUCTION NUMBER 33

Wire fraud, as referred to in Instruction 32, has five essential elements, which are:

First, the defendant made up a plan or scheme to obtain money or property by false statements or representations, and

Second, in furtherance of said plan or scheme, the defendant made certain false statements or representations and, at the time of making such false statements or representations, he knew that they were false, and

Third, that the false statements or representations related to something important to the plan or scheme, and

Fourth, that, for the purpose of carrying out such plan or scheme, the defendant placed an interstate telephone call, and

Fifth, that the defendant acted with the intention of obtaining money or property by false statements or representations.

INSTRUCTION NUMBER 34

Mail fraud, as referred to in Instruction No. 32, has five essential elements, which are:

First, the defendant made up a plan or scheme to obtain money or property by false statements or representations, and

Second, in furtherance of said plan or scheme, the defendant made certain false statements or representations and, at the time of making such false statements or representations, he knew that they were false, and

Third, that the false statements or representations related to something important to the plan or scheme, and

Fourth, that, for the purpose of carrying out such plan or scheme, the defendant used the mails; and

Fifth, that the defendant acted with the intention of obtaining money or property by false statements or representations.

INSTRUCTION NO. 35

The term "enterprise", as referred to in Instruction No. 32, is defined as any partnership, corporation, association, or other legal entity, or any group of individuals

associated in fact although not a legal entity. An "enterprise" must exhibit three basic characteristics:

(1) it must have a common or shared purpose;

(2) it must have some continuity of structure and personnel; and

(3) it must have an ascertainable structure distinct from that inherent in the conduct of the two or more acts of mail or wire fraud you may find under Instruction Number 32.

INSTRUCTION NUMBER 36

Your verdict must be for the defendant on plaintiff Henson's claim of violation of civil RICO if you believe plaintiff Henson actually discovered, or, in the exercise of reasonable diligence, should have discovered the alleged acts in violation of RICO before May 7, 1982.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 88-1991WM

87-434-CV-W-1

Appeal from the United States
District Court for the
Western District of Missouri

(Caption Omitted In Printing)

(Filed Sep. 29, 1989)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

After consideration, it is hereby ordered and adjudged that the decision of the district court is reversed in accordance with the opinion of this Court.

August 9, 1989

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEAL, EIGHTH CIRCUIT

MANDATE ISSUED, September 25, 1989
